No. 80-1597

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE N. CAMPBELL, JR.
COMMISSIONER OF TRANSPORTATION
STATE OF MAINE

Appellant

v.

JOHN DONNELLY & SONS,
NATIONAL ADVERTISING COMPANY
AND WILLIAM S. SCHAEFFER

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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March 18, 1981

Question Presented

May a statute of the State of Maine prohibiting outdoor, off-premises advertising be invalidated on its face because of its potential applicability to noncommercial speech when there was no plaintiff before the Court seeking to engage in such speech and when the Court gave no consideration to whether the statute could be construed as not applying to such speech?

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, which appears at Appendix A hereto, *infra,* was issued on December 22, 1980, and has not as yet been reported.

The opinion of the United States District Court of the District of Maine, which appears at Appendix B hereto, *infra,* was issued *sub nom. John Donnelly & Sons, et al. v. Mallar* on July 11, 1978, and is reported at 453 F.Supp. 1272.

Jurisdiction

In this case, the United States Court of Appeals for the First Circuit has held a statute of the State of Maine, the Maine Traveler Information Services Act, 23 M.R.S.A. § 1901 *et seq.*, invalid as repugnant to the First and Fourteenth Amendments to the Constitution of the United States, federal jurisdiction having been invoked under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(3) (violation of Federal Civil Rights Act).

The judgment of the Court of Appeals was entered on December 22, 1980 and a notice of appeal therefrom was duly filed with the Court of Appeals on January 8, 1981. A copy of the notice is set forth at Appendix D. Upon motion of the appellant here, on January 9, 1981, the Court of Appeals stayed the issuance of its mandate pending the disposition of this appeal by this Court. A copy of the stay is set forth at Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

The text of the Maine Traveler Information Services Act, 23 M.R.S.A. § 1901 *et seq.*, is set forth at Appendix F hereto.

Statement of the Case

A. *The Maine Act*

In 1977, the Maine Legislature enacted the Maine Traveler Information Services Act (the "Act"), 23 M.R.S.A. § 1901 *et seq.* Modeled on the Vermont Tourist Information Services Act, 10 V.S.A. § 481 *et seq.*, the Act is a comprehensive statute whose general object is the elimination of outdoor advertising not related to any business, facility or point of interest on the same premises (hereinafter referred to as "off-premises advertising" or "billboards"). The purposes of the Act are threefold: the preservation and protection of the State's general scenic character, the promotion of tourism and the promotion of highway safety by the elimination of distractions to motorists. 23 M.R.S.A. § 1901.

The Act seeks to achieve these objectives by prohibiting the erection of new off-premises signs, and providing for the removal, with compensation or by amortization, of all existing off-premises signs. 23 M.R.S.A. §§ 1908, 1915, 1916. In addition, in order to provide a means of disseminating information to the traveling public with respect to businesses and other local facilities, the Act provides for the creation of a system of standardized "official business directional signs," 23 M.R.S.A. §§ 1906, 1909-12, as well as for the establishment of official tourist information centers, 23 M.R.S.A. § 1905, and the preparation by the State of traveler information directories, guidebooks and maps, 23 M.R.S.A. § 1907.

Since its general object is to eliminate only outdoor off-premises advertising of a commercial nature, the Act also contains a number of exemptions relating to certain other categories of expression by means of signs. 23 M.R.S.A. § 1913. Most significantly for purposes of this appeal, these exceptions allow for signs showing the place and time of church services and meetings of civic organizations, 23 M.R.S.A. § 1913(1)(E); signs announcing events of public, civic, philanthropic or religious organizations up to three weeks in advance of the events, 23 M.R.S.A. § 1913(1)(F); signs erected for an election, primary or referendum up to three weeks prior to the vote, 23 M.R.S.A. § 1913(1)(I); and signs of nonprofit historical and cultural institutions, 23 M.R.S.A. § 1913(1)(J).

B. *The Litigation*

In December, 1977, shortly before the Act was to take effect, two of the three billboard companies operating in Maine, John Donnelly & Sons, and National Advertising Company, as well as William S. Schaeffer, one of National's employees, brought this action in the Federal District Court seeking declaratory and injunctive relief against the Act, asserting, *inter alia,* that it violated their First Amendment rights of free speech, as well as constituting both an invalid exercise of the police power under the Fourteenth Amendment* and a taking of their property without compensation in violation of the Fifth and Fourteenth Amendments.** Following cross-motions for summary judgment, the District Court sustained the Act against First Amendment challenge on the ground that it constituted a valid "time, place and manner" regulation of speech. *John Donnelly & Sons v. Mallar, supra* at 1276-80 (Appendix at B-4 to B-11).

On appeal, the First Circuit sustained the Act to the extent that it regulates signs bearing commercial messages (Appendix at A-4 to A-17), but invalidated it to the extent that it prohibits non-commercial, or what the Court called "ideological," speech. (Appendix at A-17 to A-18). In doing so, the Court rejected the District Court's holding that the Act's effects on this latter kind of speech were "incidental" and went on to examine the Act's special exceptions allowing for such speech, described *infra,* finding that they "do not go far enough." *Id.* Without further explanation, the Court then declared the entire Act unconstitutional.

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*The District Court eventually sustained the Act against this challenge, *John Donnelly & Sons v. Mallar, supra* at 1280-82 (Appendix at B-11 to B-14). The companies appealed this ruling to the Court of Appeals, but the Court did not reach the issue since it declared the Act unconstitutional under the First Amendment.

**By agreement of the parties, this contention, which relates solely to the amortization provisions of the Act, 23 M.R.S.A. § 1916, was not presented to the District Court, *John Donnelly & Sons v. Mallar, supra* at 1275, n. 2 (Appendix at B-2, n.2), and was ultimately voluntarily dismissed by the companies without prejudice immediately prior to their appealing the District Court's decision. Those signs required to be removed by amortization are permitted by the Act to remain in place for six years after the Act's effective date, or until January 1, 1984. 23 M.R.S.A. § 1916(2).

The Question Presented is Substantial

A Conflict Exists Between the Decision of the First Circuit in This Case and That of the Supreme Court of California in a Case Currently Under Advisement in This Court.

As indicated in the Statement of the Case, *infra,* the First Circuit in this case sustained the Maine Act as a valid "time, place and manner" restriction on commercial speech but invalidated the Act because of its effects on noncommercial or "ideological" speech. In so doing, the Court did not determine whether the Maine Act was susceptible of being construed so as to avoid its application in this latter area of high constitutional sensitivity; nor did it consider whether it should refrain from invalidating the Act on its face because of the absence of any party before it who sought to engage in noncommercial or "ideological" speech. Rather, the Court merely held that the Act's exemptions for certain kinds of ideological speech "do not go far enough" and struck down the entire statute (Appendix at A-18).

Almost identical problems were presented to the California Supreme Court in the recent case of *Metromedia, Inc. v. San Diego,* 26 Cal.2d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), on appeal from which this Court noted probable jurisdiction, 49 U.S.L.W. 3264 (October 14, 1980), and heard oral argument on February 25, 1981. In that case, the City of San Diego passed an ordinance strikingly similar to the Maine Act, banning the erection of new off-premises signs and providing for the amortized removal of all existing off-premises signs. *Metromedia, Inc. v. San Diego, supra,* 26 Cal. 3d at 856-57, 610 P.2d at 410, 164 Cal. Rptr. at 513. In addition, like the Maine Act, the San Diego ordinance exempted certain categories of signs carrying noncommercial messages, most notably "temporary political signs . . . erected and maintained no longer than 90 days." *Id.*, at note 1.

Relying in part on the District Court opinion in this case, the California Supreme Court sustained the validity of the San Diego ordinance as a valid "time, place and manner" restriction on free speech. In so doing, the Court adopted a narrowing

construction to confine the ordinance's applicability to the commercial sphere only. The Court said:

> "To avert [the danger of the ordinance's applicability to noncommercial speech], and to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail, we adopt a narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment."

Id., at note 2 (citations omitted). See *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

In addition, in discussing whether adequate alternatives to billboards existed sufficient to satisfy the "time, place and manner" test, the California Supreme Court observed that

> "the possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face.* In the present litigation, which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that . . . the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message."

Metromedia, Inc. v. San Diego, supra, 26 Cal.3d at 869, n. 14; 610 P.2d at 419, n. 14; 164 Cal. Rptr. at 522, n. 14 (emphasis the Court's). See *Spence v. Washington*, 418 U.S. 405, 414, n. 9 (1974). This analysis may be applied with equal force to protect the rights of those who wish to communicate noncommercial messages by means of billboards.

The California Supreme Court has thus provided two grounds for avoiding a declaration of invalidity of both the San Diego ordinance and the Maine Act: the legislation can be construed so as not to apply to noncommercial speech, and it may be sustained on its face as to the challenges of the present plaintiffs, leaving any challenge to its validity as applied to any person seeking to communicate ideological messages by means of billboards for another occasion.

The First Circuit did not consider either of these approaches, but rather, once it found the Maine Act had any conceivable impact on ideological speech at all, invoked the Draconian remedy of invalidating the entire statute. Thus, the State would urge this Court to note probable jurisdiction in this case, so that if this Court affirms the decision of the Supreme Court of California in *Metromedia,* it could then reverse the decision here with instructions that the Court of Appeals bring its ruling into conformity with that of the California Court and thus avoid invalidation of the Maine Act on its face.* The conflict between the two decisions would thereby be resolved.

*The State would also note that if the decision of the First Circuit invalidating the Act on its face is allowed to stand, the State may be vulnerable to an award of attorney's fees under the Federal Civil Rights Act, 42 U.S.C. § 1981 *et seq.*, since the complaint contains a claim thereunder.

Conclusion

Because of the conflict between the decision of the Court of Appeals in this case and that of the California Supreme Court in *Metromedia, Inc. v. City of San Diego,* which case is currently under advisement in this Court, the Court should note probable jurisdiction of this case and dispose of it in a manner consistent with its resolution of the *Metromedia* case.

Respectfully submitted,

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March 18, 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1575

JOHN DONNELLY & SONS,
NATIONAL ADVERTISING COMPANY
and WILLIAM S. SCHAEFFER,
Plaintiffs, Appellants,

v.

GEORGE N. CAMPBELL, JR.,
COMMISSIONER OF TRANSPORTATION,
STATE OF MAINE,
Defendant, Appellee.

Decided — December 22, 1980

Before
Aldrich and Bownes, *Circuit Judges,*
Pettine, *District Judge.**

* Of the District of Rhode Island, sitting by designation.

ALDRICH, *Senior Circuit Judge.*

The question before us of the constitutionality of a Maine statute requires the assessment of a number of general societal values against their cost in First Amendment rights. The statute, 23 M.R.S.A. §§ 1901 *et seq.*, is entitled the Maine Traveler Information Services Act, somewhat euphemistically,[1] since its principal purpose is to abolish billboards altogether and to reduce materially the number, size and content of all other signs viewable by travelers on any public way in the state.[2] The complainants are two corporations that erect signs, John Donnelly & Sons (billboards) and National Advertising Company (others), and one individual who wishes to read them.[3] Rejecting plaintiffs' claims that the statute impermissibly overrode First Amendment rights, the district court, with an extensive opinion, *John Donnelly & Sons v. Mallar,* 453 F.Supp. 1272, dismissed the action, and plaintiffs appeal.

The legislature in its preamble asserted three justifications for the statute's prohibitions: the protection of the state's landscape, a natural resource; the enhancement of the tourist industry, and the public interest in highway safety. To compensate for its restrictions on signs, the law provides for various

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[1]Plaintiffs' brief reciprocates by naming the law the Maine Anti-Billboard Act. Both sides are following tradition. The restrictions introduced by the Federal Highway Beautification Act are announced as promoting "effective display of outdoor advertising. . . ." 28 U.S.C. § 131(d), as if the industry were receiving needed help in running its business. For a cynical account of the non-enforcement of that act, see N. Price, On Billboards, Sierra, Sept.-Oct. 1980, 76.

[2]As a matter of record we note that the 1977 form, which was before the district court, has since been amended, notably a new section 1913, Me. Laws 1979, c. 477, a fact plaintiffs' brief fails to recognize.

[3]The two companies together own almost 1000 of some 2500 billboards in the state. The individual plaintiff claims that he wishes to see signs reminding him to drive safely and slowly, and to avoid littering the highways. His affection for manmade, over "nature's symbols and signs," may possibly be enhanced by the fact that he is an employee of one of the corporate plaintiffs. As this is not a class suit, the size of the class that could adequately be represented by the individual plaintiff is not before us. In this opinion we refer usually to the corporate plaintiffs who, in any event, have full standing to bring suit. *See Bigelow v. Virginia,* 1975, 421 U.S. 809.

informational services. The presently salient aspects include the following.

§ 1902. **Policy and purposes**

To promote the public health, safety, economic development and other aspects of the general welfare, it is in the public interest to provide tourists and travelers with information and guidance concerning public accommodations, facilities, commercial services and other businesses, and points of scenic, cultural, historic, educational, recreational and religious interest. To provide this information and guidance, it is the policy of the State and the purpose of this chapter to:

1. **Official information centers; signs.** Establish and maintain official information centers and a system of official business directional signs;

2. **Information publications.** Provide official directories, guidebooks, maps and other tourist and traveler information publications;

3. **Control outdoor advertising.** Prohibit and control the indiscriminate use of outdoor advertising; and

4. **Protection of scenic beauty.** Enhance and protect the natural scenic beauty of the State.

§ 1903. **Definitions**

. . .

14. Sign. 'Sign' means any structure, display, logo, device or representation which is designed or used to advertise or call attention to any thing, person, business, activity or place and is visible from any public way. It does not include the flag, pennant or insignia of any nation, state or town. Whenever dimensions of a sign are specified they shall include frames.

§ 1908. **Regulation of outdoor advertising.**

No person may erect or maintain signs visible to the traveling public from a public way except as provided in this chapter.

We begin with a review of the governing principles.

> "[A] direct and substantial limitation [on speech can] be sustained [if] it serves a sufficiently strong, subordinating interest that the Village is entitled to protect." *Schaumburg v. Citizens for a Better Environment,* 1980, 444 U.S. 620, 636.

Time, place, and manner restrictions are permissible if

> "they are justified without reference to the content of the regulated speech, . . . they serve a significant governmental interest, and . . . in so doing they leave open ample alternative channels for communication of the information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 1976, 425 U.S. 748, 771.

Like most one-liners, these are overly simplistic. In our case, they omit an important consideration: not only must the restrictions serve a "sufficiently strong" or "significant governmental interest," they must significantly serve that interest. Hence we must evaluate not only the importance of the state's interests, but also the extent to which the restrictions further those interests, viz., their "reasonable relationship to the achievement of the governmental purpose." *Bates v. Little Rock,* 1960, 361 U.S. 516, 525. Finally, in measuring the effect of the statute on free expression, the freedoms of the First Amendment must be kept "in a preferred position." *SAIA v. New York,* 1948, 334 U.S. 558, 562; *see Schneider v. State,* 1939, 308 U.S. 147, 161. In other words, the regulation must be no more restrictive than reasonably necessary to serve the governmental interest. *Brown v. Glines,* 1980, 444 U.S. 348, 355.

In sum, when First Amendment freedoms are on one side of the scale, the balance must be struck by the courts, not by the legislators.

> "A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant

> with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia,* 1978, 435 U.S. 829, 844.

After determining that the statute is not impermissibly content-directed, the court must gauge the validity and strength of the state's interest, the extent to which the restrictions further it and the sufficiency of the alternative means or remaining channels of communication, and then determine whether, in their totality, the limitations imposed by the statute are justified. *See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* ____ U.S. ____, 48 U.S.L.W. 4783, 4785 (decided 6/20/80); *Baldwin v. Redwood City,* 9 Cir., 1976, 540 F.2d 1360, 1365-68, *cert. denied,* 431 U.S. 913; *State v. Lotze,* 1979, 92 Wash. 2d 52, 593 P.2d 811, *appeal dismissed,* 444 U.S. 921; Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464, 466-468 (1969).

We are satisfied that the law, generally, is not directed to content. Billboards are banned not because of the messages they convey, but because the medium itself is objectionable. *Metromedia, Inc. v. San Diego,* 1980, 26 Cal.3d 848, 610 P.2d 407, 418, 164 Cal. Rptr. 510, *prob. juris. noted,* 10/14/80, 49 U.S.L.W. 3270. Plaintiffs point to the fact that some of the exceptions to the statute's prohibitions do depend on the message conveyed,[4] and accordingly argue that the statute is content-oriented. The argument proves too much. Each of the exceptions reflects "an appropriate governmental interest."

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[4] **§ 1913. Categorical signs**

> 1. **Types of signs.** The following signs may be erected and maintained without license or permit under this chapter as follows:
>
> A. Signs of a duly constituted governmental body, . . .;
>
> B. Signs located on or in the rolling stock of common carriers, except those which are determined by the commissioner to be circumventing the intent of this chapter. . . .;

Police Department of Chicago v. Mosley, 1972, 408 U.S. 92, 95; *see Carey v. Brown,* 1980, U.S. , 48 U.S.L.W. 4756 (decided 6/20/80). *See also Gay Students Organization v. Bonner,* 1 Cir., 1974, 509 F.2d 652, 660-62 and n.6; *People Acting Through Community Effort v. Doorley,* 1 Cir., 1972, 468 F.2d 1143, 1145; Karst, *Equality as a Central Principle in the First Amendment,* 43 U.Chi.L.Rev. 20 (1975). Some — for signs of governmental and quasi-governmental bodies, and for traffic and bus signs and the like — are justified by sheer public necessity. Others — *e.g.,* for signs showing the place and time of meetings, services and events of religious, civic and philanthropic and other public organizations, and, of course, for voter information for elections, primaries and referenda — reflect the important governmental interest in dissemination of information of special public concern. These fall in the category of ideological speech[3] even though they may involve raising money to carry out the sponsoring group's primary functions, *see Schaumburg v. Citizens, ante,* 444 U.S. at

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C. Signs on registered and inspected motor vehicles, except those which are determined by the commissioner to be circumventing the intent of this chapter. . . .;

D. Signs, with an area of not more than 260 square inches, identifying stops or fare zone limits of motor buses;

E. Signs showing the place and time of service or meetings of churches and civic organizations in the municipality or township. Each church or civic organization may erect no more than 4 signs. No sign shall exceed in size 24 inches by 30 inches;

F. Signs to be maintained for not more than 3 weeks announcing an auction, public supper, lawn sale, campaign, drive or other like event of a public, civic, philanthropic or religious organization, provided these signs are located within the municipality or township where the activity is located. The date of this event is to be conspicuously posted on each sign;

G. Memorial signs or tablets;

H. Signs erected by fairs and expositions within the county where the activity is located. These signs may

628-33; *Murdock v. Pennsylvania,* 1943, 319 U.S. 105, 110-112; *Jamison v. Texas,* 1943, 318 U.S. 413, 416-17, which is still accorded fuller rights under the First Amendment than commercial speech. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, ante,* 48 U.S.L.W. at 4784; *Consolidated Edison Co. of New York v. Public Service Comm'n of New York,* 1980, U.S. , 48 U.S.L.W. 4776, 4778 n.5. This being said, it would ill behoove the courts to deny the legislature the power to make the same distinction. "Even within the area of protected speech, a difference in content may require a different government response." *Young v. American Mini Theatres, Inc.,* 1976, 427 U.S. 50, 66. In sum, we do not find that these exceptions change the statute from a time, place and manner restriction to one impermissibly based on content.

We must, however, charge some of the restrictions with being excessively content-related. To replace some of the multitude of size and styles of signs outlawed by the Act, provision is made for "official business direction signs" (OBDS), to be furnished by the applicant, but to be erected by the Commission of

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be erected and maintained for 3 weeks before this event. The date of the event is to be conspicuously posted on each sign;

I. Signs erected for an election, primary or referendum. These signs shall be erected no sooner than 3 weeks before the date of the election, primary or referendum and shall be removed no later than one week after that date; and

J. Signs erected outside of the public right-of-way by nonprofit historical and cultural institutions. Each institution, who has certified its nonprofit status with the commissioner, may erect no more than 2 signs with a surface area not to exceed 50 square feet per sign.

'We hereafter use the adjective "ideological" — "relating to or concerned with ideas," *Webster's New Int'l Dictionary,* Third Ed. (1968) — as a shorthand reference to all noncommercial speech. "Commercial" speech, on the other hand, relates "solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, ante,* 48 U.S.L.S. at 4784. That the distinction is viable, *see id.,* is not to suggest it is always easy. *See Schaumburg v. Citizens, ante,* 444 U.S. at 628-32.

Transportation. Content, as well as size and style, is strictly limited.[4] The state interests offered to support the act, *post,* may, within limits, justify maximum sizes and uniformity of style. We fail to see the necessity, however, of restricting OBDS content to "route and distance." (Section 1903, subsection 7). And, while overly large signs can well be objectionable, it seems extreme to set the size so small that there is no room for further information. To limit, for example, a motel having a large amount of luxury equipment to the same announcements as one with none, absent a compelling reason, is contrary to the philosophy of *Virginia Bd. of Pharmacy, ante,* both with respect to the owner of the sign, and the traveling public. Rather, it seems an over-emphasis on neatness. We do not at all suggest opening the door wide, but on the present record we believe it is shut overtight.

The state's asserted justifications, as we have said, are three. With respect to highway safety, it correctly points out that many courts have found this a sufficient, or at least an important reason for banning billboards. Some consider only whether highway safety is a permissible basis for an exercise of the police power so as to avoid the requirement of compensation for a taking. *E.g., E.B. Elliott Advertising Co. v. Metropolitan Dade County,* 5 Cir., 1970, 425 F.2d 1141, 1151-52, *cert. dismissed,* 400 U.S. 805; *Ghaster Properties, Inc. v. Preston,*

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[4] **§ 1903. Definitions.**

7. Official Business Directional Signs. "Official Business directional signs" means a sign erected and maintained in accordance with this chapter, to indicate to the traveling public the route and distance to public accommodations, facilities, commercial services for the traveling public and points of scenic, historical, cultural, recreational, educational and religious interest.

§ 1906. Official business directional signs.

1. Erection and maintenance. The commissioner, with the advice of the Travel Information Advisory Council, shall designate locations for and erect official business directional signs licensed under this chapter. The official business directional signs shall be furnished and preserved by the applicant thereafter and shall conform to regulations issued by the commissioner with the advice of the Travel Information Advisory Council. Such regulations shall be consistent with section 1910.

1964, 176 Ohio St. 425, 200 N.E. 2d 328, 335-37; *General Outdoor Advertising Co. v. Department of Public Works,* 1935, 289 Mass. 149, 180-84, 193 N.E. 799, 813-15, appeal dismissed, 297 U.S. 725. Others approve a legislative finding that the promotion of highway safety is sufficient to outweigh the burden upon speech. *E.g., State v. Lotze, ante,* 593 P.2d at 813-14; *Metromedia, Inc. v. San Diego, ante,* 610 P.2d at 416-20. *But see State v. Pile,* 1979, Okla. , 603 P.2d 337, *pet'n. for cert. filed sub nom. Oklahoma v. Pile,* No. 79-1617 (2/11/80), 48 U.S.L.W. 3699 (opinion by a divided court that there must be a "clear and present danger" to justify "dubious intrusions" on liberties.) Our difficulty is that these courts, as the state here, apparently consider the issue to be simply whether billboards can rationally be said to affect highway safety, reasoning that highway safety is a proper police power matter as to which the state interest is strong, and since billboards could affect highway safety, the legislative determination is to be respected. This approach disregards the question of the substantiality of the connection between the challenged measure and the state interests asserted to support it.

We agree that even under *Landmark Communications, ante,* once it is concluded that there is a rational connection between means and end, the legislative determination is entitled to weight. How much weight is another matter. This being a motion for summary judgment, plaintiffs' affidavits have presented an exceptionally strong array of uncontradicted recitals that billboards do not cause accidents. The state's response that these opinions, although based on studies backed by statistics, are not evidentiary, but merely conclusory, is not

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§ 1910. Types and arrangements of signs.

Subject to this chapter, the commissioner, with the advice of the Travel Information Advisory Council, shall regulate the size, shape, color, lighting, manner of display and lettering of official business directional signs. Such regulations shall require uniformity among signs in accordance with the following minimum requirements: No sign shall exceed in size 20 inches by 84 inches; uniform colors shall be specified for each type of service and facility; lettering size shall be uniform; logos shall not exceed a uniform size; and posts shall be a uniform size, shape and color. An appropriate symbol may be specified for each type of eligible service or facility for inclusion upon official business directional signs.

well taken. Not only is the record devoid of contrary evidence, *see* F.R.Civ.P. 56(e), but to the extent that we could take judicial notice from our own observations, we know of nothing to support the state's claim that there is no factual issue. *Cf. Hirschkop v. Snead,* 4 Cir., 1979, 594 F.2d 356, 373 (need for "empirical data" where efficacy of rule restricting freedom of speech is not clear.)

There is a further difficulty. The statute's condemnation is universal, regardless of the nature of the ways, of the extent of the unimpeded view, and of particular traffic conditions. In the interest of workable enforcement some overbreadth is permissible, but the disparity here seems far from minimal. Moreover, we can think of no reason to believe that the signs which the statute permits will be any less distracting than some of those that are prohibited. The contrary may well be supposed. Vehicular signs, permitted under the statute, have long been recognized as posing traffic safety problems. *See Railway Express Agency, Inc. v. New York,* 1949, 336 U.S. 106, 109. Other types of signs are permitted because they are deemed particularly important, *see* n.4, *ante;* these, too, would seem particularly distracting. Finally, and significantly, on-premise signs seem far greater traffic hazards than signs conveying information for future use. One need hardly ask which is more likely to disturb the traffic pattern, a sign that advertises that some product or service ahead, or one that causes the passenger or driver to exclaim that the spot is just being passed.

The fact that the statute may retain some dangerous signs and leave some that are not is not determinative, but does diminish the overall importance, from the standpoint of safety, of the restrictions effected. Concededly the purpose of all signs is to attract attention, and it must be that they generally do so or plaintiffs could not operate. *Moore v. Ward,* Ky., 1964, 377 S.W.2d 881, 886. Nevertheless, it does not follow that the prohibited signs pose a significant threat to highway safety; the record before us strongly suggests the contrary. We hold on the present record that highway safety is not a sufficient ground, standing alone, to support so broad a statute, and we have doubts whether it is even a strong contributing factor.[7]

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[7]We are without the district court's appraisal of the record on this point. Having found other grounds for upholding the statute, it did not reach this issue.

The far better justifications for the statute are the preservation of the state's natural beauty for all its inhabitants, and the consequent enhancement of one of its great economic resources, the tourist industry. Here, as distinguished from traffic safety, plaintiffs are inescapably faced with numbers—the more signs, the worse the appearance. While a substantial number of billboards might well be left at selected locations without endangering highway safety, any appreciable number will injure the landscape. An aesthetic justification also fares better than highway safety from the standpoint of judicial notice. While we may feel unqualified on this record to declare the extent of the detrimental effect of billboards as a class upon highway safety, with respect to aesthetics their effect is obvious. One cannot review the billboard exhibits to plaintiffs' affidavits without a resurgence of unpleasant memories, nor can we doubt that the removal of billboards and large signs as provided for in the act would substantially benefit the state's attractive landscape.

The question, therefore, is not whether there is a substantial connection between the restriction and the interest intended to be protected, but only whether the interest is one entitled to protection, and whether it is strong enough to justify the act's restrictions on speech. As to the first, the law is clear. In *Berman v. Parker,* 1954, 348 U.S. 26, 33, the court said,

> "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (Citation omitted).

The cases are almost uniform that there is a strong governmental interest in preserving the beauties of the landscape. *E.g., Berman v. Parker, ante,* 348 U.S. at 33; *Metromedia, ante,* 592 P.2d at 735-36; *Suffolk Outdoor Advertising Co. v. Hulse,* 1977, 43 N.Y.2d 483, 408 N.Y.S.2d 368, 373 N.E.2d 263, *appeal dismissed,* 439 U.S. 808; *John Donnelly & Sons, Inc. v. Outdoor Advertising Board,* 1975, 369 Mass. 206, 216-24, 339 N.E.2d 709, 717-20; *Markham Advertising Co. v. State,* 1968, 73 Wash. 405, 439 P.2d 248, 259-60, *appeal*

dismissed, 393 U.S. 316; *Cromwell v. Ferrier,* 1967, 19 N.Y.2d 263, 225 N.E. 2d 749; *Ghaster Properties, ante,* 200 N.E.2d at 336-37; *General Outdoor Advertising, ante,* 289 Mass. at 184-89, 193 N.E. 815-17.

Hand in hand with aesthetics is tourism, one of Maine's important industries and a substantial economic resource. We would doubt whether the perennial visitor who has a summer residence would be deterred by the unpleasantness of the trip, but for those for whom the trip is the objective — the number of whom is attested to by the quantity of motels, restaurants and roadside attractions — it is a different story. "Because this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value." *Metromedia, ante,* 610 P.2d at 413; *see also E.B. Elliott, ante,* 425 F.2d at 1152; *New Orleans v. Pergament,* 1941, 198 La. 852, 5 So.2d 129, 131. It cannot be doubted that the legislature has the right to protect this industry, nor can we question, as we did with highway safety, the direct connection between signs, scenery, and tourism. Furthermore, particularly in the absence of any contrary showing, the weighing of the pros and cons and determining the net benefits must be a legislative judgmental matter, and not a judicial one.

Concededly, not all members of the tourist industry are pleased by the statute. A small number have furnished support to the plaintiffs by way of affidavits. One is the president of the Maine Mid-Coast Route One Association, who wants no interference with signs on Route One, a principal highway. The others represent tourist attractions located off principal highways, primarily in the Boothbay area, a number of miles from Route One, who, again, want signs on the principal highways. With respect to establishments such as these which cannot be so well served by on-premise signs, we consider them candidates for section 1911(3), which liberalizes the restrictions on Official Business Directional Signs in cases of "unusual hardship due to conditions of topography, access or other physical characteristics." They will be further assisted if the legislature liberalizes the permissible content of official business directional signs. It will be time enough for off-route businesses to object if they can show specific, unallayed hardship. We will not invalidate an entire statute on the theory that they might not be heard, or on an unsupported inference that

the legislature has flaunted the wishes of the tourist industry as a whole.

As distinct from highway safety, then, the statute undoubtedly advances the related state interests in aesthetics and tourism. Nor do we agree with plaintiffs that the statute is not narrowly drawn to serve this purpose. It is true that all signs are not equally disfiguring, and that some locations, less attractive to start with, would suffer less than others. But even if one were to concede that some particular locations might be but little hurt by the presence of signs, the legislature could well feel that this overinclusiveness must be tolerated. Assuming the state's substantial interest in an aesthetic landscape, the question is whether there are any practical alternatives. One can easily imagine the problems involved in attempting to zone the entire state. Few will be satisfied. Urban dwellers, as well as country residents and travelers, have an interest in the quality of their surroundings. *Berman v. Parker, ante; John Donnelly & Sons, Inc. v. Outdoor Advertising Board, ante,* 369 Mass. at 221-24, 339 N.E.2d at 719-20. Quite apart from the work, and expense, there would be substantial difficulties in the determination and application of standards, with the assurance that other plaintiffs, if not these, would be quick to sue. Moreover, to designate one area as, so to speak, second class, might not only inspire complaints, but would tend to impede improvement. On the other hand, as against general zoning, a commission that would decide on a piece-by-piece basis might well experience even greater difficulties.[8] In short, we feel the statute is as narrowly drawn as is practically and legally possible.

Nor are we moved by the suggestion that it diminishes the state's aesthetic position to allow on-premise signs while imposing greater restrictions on others. Apart from the necessity of making some commercial allowances, on-premise signs are the least aesthetically offensive. The advertised structure, whether flea market, gas station, or restaurant, has already violated the landscape, and the act so limits permissible on-

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[8]It is perhaps not unduly apprehensive to foresee serious First Amendment problems in advance rulings against individual signs. *Cf. Shuttlesworth v. Birmingham,* 1969, 394 U.S. 147; *Staub v. Baxley,* 1958, 355 U.S. 313; *Kunz v. New York,* 1951, 340 U.S. 290 (cases invalidating permit requirements restricting expression).

premise signs as to ensure that any further damage will be negligible.[9] From the point of view of aesthetics there is no unfair discrimination in disfavoring off-premise as against on-premise signs. *Newman Signs, Inc. v. Hjelle,* N.D., 1978, 268 N.W.2d 741, 758-59, *appeal dismissed,* 440 U.S. 901. Similarly, the permitted signs on common carriers and motor vehicles, section 1913(1)(A), are of a more ephemeral nature; to outlaw them, moreover, would present difficult questions regarding interstate commerce. *Compare Southern Pacific Co. v. Arizona,* 1945, 325 U.S. 761, *with South Carolina State Hwy. Dep't. v. Barnwell Bros.,* 1938, 303 U.S. 177.

On the matter of alternative or remaining means we would divide commercial speech into two categories: general advertising for national brands, and specific advertising by individual purveyors of goods and services. Concededly there is some loss, as is always the case when the public interest conflicts with the private. For general advertising, however, we see no problem. While naturally plaintiffs, particularly the billboard plaintiff, tout the special qualities of roadside promotion, the dollar statistics and judicial notice both point to ample alternatives. For individual purveyors, besides permitted official business directional signs, the statute allows a substantial amount of on-premise notification. In addition, the statute provides for official tourist information centers, section 1905,[10] and for directories and guidebooks and other services, section 1907.[11] They are by no means cut off.

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[9]Number, height, size, location, lighting, etc. of on-premise signs are carefully regulated. See section 1914, subsection 6. Subject to comments elsewhere in this opinion we generally accept this principle.

[10]**§ 1905. Official tourist information centers**

To the extent funds are available or contracts can be entered into, the commissioner shall establish official tourist information centers near the principal entrance points into the State, as determined by the commissioner, and at such other locations as the commissioner deems appropriate in order to provide information about public accommodations, facilities, commercial services and other business for the traveling public, and points of scenic, historic, cultural, recreational, educational and religious interest.

[11]**§ 1907. Published information**

To the extent funds are available or contracts are entered into, the commissioner shall provide directories, guidebooks, maps and other published infor-

We may agree, in spite of all this, that for some persons the statute's curtailments may effect a noticeable diminution of opportunities. It is to be observed, however, that not only is commercial speech not entitled to full First Amendment protections, but deprivation of highway opportunities is not as legally objectionable as some other curtailments. The use of land adjoining the highway for commercial advertising is really use of the highway itself. *New York Thruway Authority v. Ashley Motor Court, Inc.*, 1961, 10 N.Y.2d 151, 176 N.E.2d 566, 569. Highways are "created for a quite different purpose by the expenditure of public money . . . " *General Outdoor Advertising Co. v. Department of Public Works, ante,* 289 Mass. at 169, 193 N.E. at 808. As such they are to be distinguished from parks or other facilities created for general use, and weight should be given to the state's right to restrict the state-created incidental benefits. *Cf. Lehman v. Shaker Heights,* 1974, 418 U.S. 298, 302-03 (majority opinion), 305-06 (Douglas, J., concurring in judgment). In sum, we believe the general tenor of the statute, so far as commercial advertising is concerned, is sufficiently supported by the public good.

Plaintiffs seek to distinguish the numerous cases upholding billboard laws by urging that only certain highways or municipalities were involved, and that none was a statewide ban on all billboards. The distinction is misleading. Many of these statutes banned billboards from the interstate and primary systems in the entire state. *E.g., Stuckey's Stores Inc. v. O'Cheskey,* 1979, 93 N.M. 312, 600 P.2d 258, *appeal dismissed,* 48 U.S.L.W. 3732; *State v. Lotze, ante; Newman Signs, Inc., v. Hjelle, ante; Modjeska Sign Studios, Inc. v. Berle,* 1977, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255, *appeal dismissed,* 439 U.S. 809; *Markham Advertising Co. v.*

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mation, showing the location of routes and available public accommodations, facilities, commercial services for the traveling public and other businesses and points of scenic, recreational, historic and cultural interest. He may include in those guidebooks, and other published materials, paid advertising, identified as such, and shall make them available to visitors and to the general public at information centers and booths, service stations and garages, hotels, motels and restaurants, historical attractions and educational facilities, and such other places as he may find desirable. The commissioner shall cooperate with other state, federal and local agencies that provide information to travelers in the administration of this section.

State, ante; Ghaster Properties, Inc. v. Preston, ante. Since billboards are profitable only in terms of exposure, one does not see many of them on the secondary roads that concerned the majority in *State v. Pile, ante.* If plaintiffs lost use of the highways we cannot believe they could subsist on the byways; indeed, they say as much. What plaintiffs, and such tourist industries as support them, *see ante,* are really seeking is the principal highways, as to which the distinction they attempt to draw is irrelevant. Moreover, two of the cases they cite, *Suffolk Outdoor Advertising Co. v. Hulse, ante,* and *Veterans of Foreign Wars v. Steamboat Springs,* 1978, 195 Colo. 44, 575 P.2d 835, *appeal dismissed,* 439 U.S. 809, each sustained an ordinance banning all billboards in an entire town. The advertiser who seeks to reach that audience — for example, a candidate for City Council or a local clothing store — would probably see little difference between a total municipal and a statewide ban.

Plaintiffs complain of the enormity of legislation which would abolish their entire business, per se. Times change, and businesses with them. The iceman no longer cometh, the buggy-whip manufacturer has passed from the scene, and one could name countless enterprises that have failed because of a change in public demand or sentiment. Equally public concern may overcome the economic interests of private individuals, and a state may wholly prohibit a heretofore lawful business and destroy an entire industry. *Mugler v. Kansas,* 1887, 123 U.S. 623.[12] Nor do we know of any issue of degree; plaintiffs cannot ask the public interest to give way at some economic crossroad in their balance sheets. We note, moreover, that if we were to recognize an economic approach, it would go far beyond a complaint of total abolition. Plaintiffs are already arguing that they could not survive on political speech alone if only commercial speech were restricted. Even as to commercial speech

[12]Plaintiffs' statement that "no existing legitimate business has ever been governmentally excluded from an entire state in the absence of a specific provision in the United States Constitution" is simply wrong on the facts. Moreover, the billboard law contains a feature conspicuously absent in the anti-liquor statute sustained in *Mugler;* owners of billboards are compensated for the removal of their structures or are allowed to amortize their cost over a specified period. 23 M.R.S.A. §§ 1915-16. The issue of the adequacy of the compensation and amortization provisions is not before us.

they state that "in order to survive [their signs] must be capable of being located throughout a geographical area." Plaintiffs' economic argument is a novel approach to the First Amendment which we decline to adopt.

To summarize, where commercial speech is concerned we would have little reservation in holding that the statute directly serves legitimate state interests and (with the exception of the restrictions in the OBDS provision) that these interests could not be served as well by a more limited restriction on commercial speech. *See Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, ante,* 48 U.S.L.W. at 4785. We note that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." *Id.* For those commercial advertisers for whom signs are an essential medium, this function is adequately served by the OBDS provision (as liberalized, *ante)* and the on-premise exception; we have little doubt that these will be well utilized. *See id.* at 4785 n.6.

There is more involved here, however, than commercial advertising. We take strong exception to the state's characterization of the statute's impact on noncommercial speech as "incidental" and "of no constitutional significance." The district court found that some 24% of the messages carried on Donnelly's billboards and 5% on those of National Advertising Company signs are noncommercial in nature. Manifestly the statute affects much ideological communication not accounted for in these figures; signs of all sorts — a candidate's poster on a telephone pole; "Jesus Saves" painted on the side of a barn — are within the statute's reach. A great deal of communication on topics of political, social, cultural, and religious import — speech long afforded maximum protection under the First Amendment, *see New York Times v. Sullivan,* 1964, 376 U.S. 254, 269-70, is regulated or prohibited by the law before us.

True, the Maine scheme makes accommodation for some signs of this type. Signs showing the place and time of church services and meetings of civic organizations; signs announcing events of public, civic, philanthropic or religious organizations up to three weeks in advance; signs erected for an election, primary or referendum, again within three weeks of the event;

and signs outside the right of way for historical or cultural organizations are all exempted. These exceptions, however, do not go far enough. Initially, we doubt that three weeks is enough time to publicize a campaign, particularly for the little-known or unpopular candidate, or cause, with the greatest need for exposure. Moreover, no exception is available for signs on important public issues as to which no referendum is pending. Messages such as "Abortion is Murder," "Save the Whales," "No Nukes," and "Contribute to your Community Fund," are altogether banned. Not even the exception for on-premise signs is available, since these must "advertise [a] business, facility or point of interest conducted thereon. . . ." Section 1903(8). The law thus impacts more heavily on ideological than on commercial speech — a peculiar inversion of First Amendment values.

The statute not only provides greater restrictions — and fewer alternatives, the other side of the coin — for ideological than for commercial speech, but in one respect ideological speech seems more dependent upon outdoor advertising to begin with. The record shows that outdoor advertising, based upon cost per exposure, is a far less expensive means of communication than radio, television, newspaper or magazines. The district court's conclusion that the fact that only 1.2% of advertising expenditures go to outdoor advertising demonstrated the alternatives available for "commercial and noncommercial advertising alike," 453 F.Supp. at 1280 & n.10, seems to us a non sequitur.[13] Signs which can be cheaply erected particularly permit advancing "poorly financed causes of little people," *Martin v. Struthers,* 1943, 319 U.S. 141, 146, a prime First Amendment objective. In short, the statute's impositions are both legally and practically the most burdensome on ideological speech, where they should be the least.

We are obliged to hold the statute unconstitutional. No further hearings could materially assist. Reversed and remanded for an entry of judgment in favor of plaintiffs.

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[13]It is also fallaciously based. The record shows, for example, that 24% of Donnelly's gross advertising space devoted to ideological use is largely donated. This must substantially affect pro rata cost figures. We remark, in passing, that we do not accept Donnelly's argument that since its ideological contributions are dependent upon revenues of its commercial advertising, the latter should be afforded the protection due the former.

PETTINE, *District Judge,* concurring in the judgment.

I concur in the judgment of the Court that the Maine Traveler Information Services Act unconstitutionally abridges First Amendment rights. The statute presents several difficult questions, and I am in accord with the majority's view on many of them. I write separately, however, because I am compelled to disagree with the implications of the court's treatment of commercial speech.

I. *The Nature of the Statute*

At the outset, I note the difficulty of placing the Maine statute into one of the traditional First Amendment analytic pigeonholes. I am troubled by denominating the statute an "incidental" restriction on expression that might be justified by a "sufficiently important governmental interest in regulating the nonspeech elements." *United States v. O'Brien,* 391 U.S. 367, 376 (1968). The state's asserted concerns — highway safety, promotion of tourism, and aesthetics — certainly seem to be interests "unrelated to the suppression of free expression," *id.* at 377, and there is no evidence that they are pretexts concealing more sinister designs. Moreover, it does appear that it is the physical existence *per se* of signs along the public highways, rather than any particular message communicated thereon, that offends those interests. Nevertheless, I do not believe that prohibiting the erection of signs could be analogized to prohibiting into *O'Brien's* "incidental limitation" framework. Unlike draftcards, which have a purpose and meaning independent of draftcards, which have a purpose and meaning independent of any potential for speech by the holder, billboards are expressions incarnate. While, in theory, the legislature's goals would be frustrated even if all highway signs were painted bright colors and conveyed no message whatsoever, we know that, in fact, people do not put up billboards simply for the sake of erecting objects along the roadways. As a practical matter, billboards do not have a purpose and meaning apart from their potential for speech. Thus, I cannot regard the statute as an "incidental" restriction on expression. Suppression of speech may not have been the motive of the legislature, but surely it was intentional, for it was a predictable and inevitable result of the enactment of this statute.

Nor am I completely comfortable labelling the statute a time, place, or manner restriction.

In the first place, permanent signs advertising the activities of certain organizations (churches and civic groups) and temporary signs advertising the happening of certain events (suppers, lawn sales, etc. of nonprofit organizations, and fairs and exhibitions) are exempted. The Supreme Court has recently reiterated that time, place, or manner regulations must be "applicable to all speech regardless of content." *Consolidated Edison Co. v. Public Service Commission,* 48 U.S.L.W. 4776, 4777 (June 20, 1980), *quoting Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209 (1975). "Governmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place, and circumstances into a concern about content'." *Id.* at 4777, *quoting Police Department v. Mosley,* 408 U.S. 92, 99 (1972). *See Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93-94 (1977). Here, the three-week sign provision and the exemption for church and civic group informational signs undeniably discriminates "between lawful and unlawful conduct based upon the content of the . . . communication." *Carey v. Brown,* 48 U.S.L.W. 4756, 4757 (June 20, 1980). Content-based distinctions are the most suspect form of First Amendment restriction. *See Erznoznik v. City of Jacksonville,* 422 U.S. at 209-12; *Police Department v. Mosley,* 408 U.S. at 95-99. Therefore, at least these portions of the statute cannot be upheld unless careful scrutiny assures us that the distinctions are finely tailored to serve substantial, or perhaps even compelling, state interests. *See Carey v. Brown,* 48 U.S.L.W. at 4757-58 (Court refers to both "substantial" and "compelling" governmental interests in discussing permissibility of content-based restrictions).

In my view, these exemptions do not pass this exacting test. For example, I fail to see any substantial state interest served by allowing a temporary sign that advertises a Christmas bazaar at the local church while prohibiting a sign of identical size, shape, color and duration that advertises a pre-Christmas sale at the local department store. Nor do I see a substantial justification for permitting a sign that states the meeting time of a civic organization while barring a similar sign announcing the meeting time of an individual's sewing circle. The majority is apparently willing to accept such results as reflecting the "im-

portant governmental interest in dissemination of information of special public concern." With respect, I am not sure that the state can decide that the events and operations of nonprofit organizations are of special concern to the public while the events and operations of businesses and individuals are not. *See Carey v. Brown,* 48 U.S.L.W. at 4758, *quoting Police Department v. Mosley,* 408 U.S. at 95-96. Moreover, the categories of temporary signs now permitted are no less threatening to the goals of the statute than would be other types, especially those put up by businesses. It might even be argued that such categories are *more* likely to be aesthetically offensive because they will probably be designed and erected by amateurs and may be less carefully constructed and secured. Therefore, I would conclude that the content-based distinctions here have little or no bearing on the interests the statute purportedly furthers.[1] *Cf. Carey v. Brown,* 48 U.S.L.W. at 4758.

Leaving aside the special problems posed by the three-week sign provision and the exemption for civic and religious organizations, I have more fundamental difficulties with regarding the statute as a time, place, or manner regulation. In my opinion, there is merit in plaintiffs' argument that the near-total interdiction of highway signs and billboards accomplished by this statute cannot be viewed as merely a limitation on when, where, or how such speech can take place. It is not an overstatement to say that the statute virtually obliterates the right to speak by sign at any place visible from Maine's public roads. All off-premise ideological speech by sign (except that covered by the two exemptions discussed above) is outlawed unless it is the subject of an upcoming election or referendum. Because permissible on-premise signs are limited to those that "advertise [a] business, facility, or point of interest conducted thereon," an individual cannot engage in ideological speech by sign even on her own property if the sign is visible from a public roadway. Nor, apparently, can she publicize such events as a

[1]The statute provides other content-based exemptions not discussed here. Some — *e.g.*, bus signs and traffic signs — are undoubtedly sustainable. Others, particularly an exemption of only three weeks for political signs, are exceedingly suspect. Because I believe that the statute is invalid in its entirety, I do not consider the particular problems that the various exemptions may present.

"Garage Sale" or "Free Kittens" that do not constitute a business conducted on the premises. Commercial entities are limited to six off-premise signs (OBDS) whose size, content and location are regulated and whose style must conform to mandated specifications. Content of on-premise commercial signs is unrestricted, but they may not exceed ten in number. All these restrictions apply not only to major commuter routes and interstate highways, but to *every* public road in the state.

The typical time, place or manner restriction involves *some* limitation on a mode of expression. *E.g., Grayned v. Rockford,* 408 U.S. 104, 116-21 (1972) (anti-noise ordinance involving grounds adjacent to school); *Cameron v. Johnson,* 390 U.S. 611 (1968) (picketing that unreasonably interferes with access to public buildings); *Adderley v. Florida,* 385 U.S. 39 (1966) (demonstrations on jailhouse grounds); *Cox v. Louisiana,* 379 U.S. 559 (1965) (picketing or parading near courthouse); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (sound trucks emitting "loud and raucous" noises);[2] *Thornhill v. Alabama,* 310 U.S. 88 (1940) (loitering or picketing at business establishment to deter public patronage). *Cf. Carey v. Brown,* 48 U.S.L.W. 4756 (picketing in residential neighborhood with content-based exception); *Police Department v. Mosley,* 408 U.S. 92 (1972) (picketing near school with content-based ex-

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[2]*Kovacs,* which sustained a municipal sound truck ordinance, is the case in which the Court appears to have come closest to regarding the eradication of a method of communication as a time, place or manner restriction. I believe, however, that that case does not in fact stand for so broad a proposition. Writing for the Court, Justice Reed stated:

> "Unrestrained use throughout a municipality of all sound amplification devices would be intolerable. Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities." 336 U.S. at 81-82.

Thus, it appears that the issue was the city's ability to regulate the *manner* of amplification — *i.e.*, "loud and raucous" — rather than the permissibility of a total ban. Citations to *Kovacs* in later cases seem to support this reading. *E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.;* 425 U.S. 748, 771 (1976); *Grayned v. Rockford,* 408 U.S. 104, 116 (1972). *Cf. Saia v. New York,* 334 U.S. 558, 561-62 (1948) (recognizing the importance of soundtrucks as a medium of expression).

ception). In these cases, use of a method of communication was prohibited in some circumstances but remained available in others. Here, however, the state has imposed a virtually absolute ban on speech by sign and billboard everywhere within its boundaries. *Cf. Covell v. Griffin,* 303 U.S. 444, 451 (1938). Perhaps it is only a question of degree, but it seems to me that when the state effectively removes one medium of communication from the palette of expressive modes available to a speaker, the difference is qualitative, rather than merely quantitative. *See Martin v. Struthers,* 319 U.S. 141, 146-47 (1943) (Court distinguishes anti-canvassing ordinance from mere time, place or manner regulation); *Schneider v. New Jersey,* 308 U.S. 147, 163-65 (1939) (Court reluctant to view anti-leaflet ordinances as merely time, place or manner restrictions). It is often said that the First Amendment affords less protection to the medium than to the message. *See, e.g.,* Kaufman, *The Medium, The Message And The First Amendment,* 45 N.Y.U.L.Rev. 762, 772 (1970). Certainly, the premise of the time, place or manner cases is that the state may regulate the form of expression to a greater extent than it can control content. *See Consolidated Edison Co. v. Public Service Commission,* 48 U.S.L.W. at 4777; *Grayned v. Rockford,* 408 U.S. at 115-16; *Cox v. Louisiana,* 379 U.S. at 554-55. However, where the method of communication at issue has been a traditionally-accepted channel for the expression of ideas and information, and where the method is not intrinsically dangerous to the speaker or the public, I find it very problematic that a state can virtually abolish that method under the guise of time, place or manner regulation.[3] *Cf. Grayned v. City of Rockford,* 408 U.S. at 117 ("Free expression 'must not, in the guise of regulation, be abridged or denied.' "); *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940) ("a state may not unduly suppress free communication of news . . . under the guise of conserving desirable conditions"). At the least, I believe such legislation should be recognized as a very unusual, and very suspect, breed of time, place or manner restriction.

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[3]My doubts are in part rooted in the recognition that the government need show only a significant interest and the presence of ample alternative channels for communication in order to justify a time, place or manner restriction. *See Consolidated Edison Co. v. Public Service Commission,* 48 U.S.L.W.

In sum, although it is a point on which reasonable minds can differ — as the court's scholarly opinion exemplifies — I would approach this statute as a deliberate and practically absolute suppression of speech expressed through a traditionally-used and commonly-accepted form of communication. It is in that light that I examine the First Amendment values implicated.

II. *Nature of the First Amendment Infringement*

As recognized by the majority opinion, the statute significantly restricts both ideological and commercial speech by sign. Of course, a governmental restriction on speech is not automatically invalid. *Consolidated Edison Co. v. Public Service Commission,* 48 U.S.L.W. at 4777. The decisive elements are the weight and urgency of the state's interests and the care with which the regulation is tailored to achieve them.

Maine has offered three justifications for the heavy burden it has imposed on written roadside communication. As the majority opinion persuasively demonstrates, the record before us simply does not support the asserted nexus between highway safety and the prohibition of signs and billboards. Beyond that, the state has expressed its concern for encouraging tourism and preserving the aesthetic purity of its many scenic vistas. I am not so sure as my brothers that the former of these interests is actually furthered by this statute. Without doubt, Maine's natural beauties attract tourists; presumably, the more un-

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4776, 4777 (June 20, 1980). It seems to me that this standard does not afford sufficient protection for First Amendment values when the loss of a commonly-accepted medium of expression is the price exacted by the statute. Suppose the state were to ban newspapers, citing the environmental damage attendant on their production and the waste disposal problems created by their use. Would we be willing to sustain such a statute even if the state could show that, in a society which increasingly prefers the electronic media to reading, radio and television are adequate alternative methods of reaching most people?

The *method* of expression may not have the same claim to First Amendment protection as does the *content. See Grayned v. Rockford,* 408 U.S. at 115-16; *Cohen v. California,* 403 U.S. 15, 18-19 (1971). The law is not yet prepared to agree with Marshall McLuhan that the medium is the message. However, the speaker's ability to choose the medium is, I believe, a distinct and important part of First Amendment rights. (I am speaking here, of course, of methods of expression that do not threaten the speaker or the per-

spoiled those beauties remain, the more tourists will sojourn in the state. However, the value of vacationers to the state lies not in their mere physical presence within its borders. Tourists are desired because they spend money. It stands to reason that the more frequently and forcefully visitors are assured of the desirability of the state's restaurants, motels, stores, and other attractions, the more likely they are to leave their money behind them in Maine. A law that silences a significant source of such assurances seems to me a peculiar way to foster tourism. Undoubtedly, there is a point at which the cost of roadside advertising (*i.e.*, the number of tourists repelled by a billboard-filled highway) outweighs its economic returns, but the record before us contains no more evidence on this point than it does on highway safety. Therefore, I would conclude that the statute cannot be justified as a means of preserving the economic resource of tourism.

To my mind, then, the state's sweeping ban on billboards and highway signs must stand or fall on the basis of its concern for aesthetic values. In attempting to determine whether this interest is sufficient to warrant so great an intrusion on First Amendment rights, we are again confronted by analytic difficulties. As I have already noted, I am uncomfortable regarding the statute merely as an incidental limitation on expression or as the typical time, place or manner restriction. Rather, I would treat it as a deliberate suppression of speech, for Maine has singled out only one manmade intrusion on

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son or property of another.) Whether we view it from the speaker's perspective, and say that the choice of medium is a component of the personal fulfillment fostered by the First Amendment, *see Cohen v. California*, 403 U.S. at 25-26, or from the audience's perspective, and say that each medium makes a unique sensory and psychological impact that cannot be precisely duplicated by any other, the speaker's autonomy in medium selection is a factor that should not be undervalued. When the state would outlaw a mode of expression — particularly a mode that has traditionally received society's approval, or at least tolerance — more is involved than simply whether the speaker can adequately convey her message using means the state will permit her to employ. *Cf. Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). *See also Thornhill v. Alabama*, 310 U.S. 88, 95-96, 105-106 (1940). The standard we use to review such legislation should at least recognize all that is at stake.

nature — a form of speech — as the target of its aesthetic concern. This creates a problem, however, in that different standards reflecting different quantums of constitutional protection apply to the restrictions on ideological and commercial speech. Thus, I follow the majority's lead in bifurcating the statute for purposes of analysis, considering it separately with respect to each type of speech. That we feel compelled to make a content-based analysis of what purports to be (with limited exceptions) a content-neutral statute further points up the difficult and unsettling nature of Maine's actions here.

A. Impact on Ideological Speech

The First Amendment's prime solicitude for ideological speech is reflected in the stringent standard required of statutes that would deliberately suppress such speech: the restriction must be a precisely drawn means of serving a compelling state interest. *Consolidated Edison Co. v. Public Service Commission,* 48 U.S.L.W. at 4778. I concur with the majority that Maine's statute is unconstitutional because I believe that the state's aesthetic concerns, legitimate and important as they are, are not sufficiently compelling to justify the near-total ban on ideological speech by sign. The First Amendment requires that we tolerate a certain amount of speech in forms that are not soothing to the ear or pleasing to the eye. *See Cohen v. California,* 403 U.S. 15, 21, 24-25 (1971). *Cf. Rowan v. Post Office Department,* 397 U.S. 728, 738 (1970). In part, this reflects a solicitude for the speaker's ability to select the medium he believes most suited to his message; in part, it reflects a recognition that a medium which one listener finds ineffective or even offensive may be perceived by another as influential or even appealing. I do not think that the state can virtually eradicate ideological speech by billboard and highway sign simply because it believes that all its public roadways would be more aesthetically pleasing without the attendant clutter.[4]

[4]My conclusion as to this statute's invalidity would not change were I to analyze it as merely a time, place or manner regulation. Even if the state's aesthetic concerns qualify as a *significant* governmental interest, I concur wholeheartedly with the majority's assessment that there are no adequate alternative channels for many ideological speakers if billboards and highway signs are entirely banned. Whether Maine could accomplish a more

B. Impact on Commercial Speech

The impermissible burden imposed by the statute on ideological speech is sufficient to require its invalidation without even considering its effect on commercial expression. However, because the majority devotes a substantial portion of its opinion to the commercial speech aspect, and because I feel constrained to disagree with some of what is said there, I also reach the commercial speech issue.[5]

The Supreme Court's most recent pronouncement in this area teaches that a deliberate suppression of commercial speech is permissible only when a substantial government interest is directly advanced by a statute no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 48 U.S.L.W. 4783, 4785 (June 20, 1980) (standard for accurate commercial speech concerning lawful activity). I concur wholeheartedly with the court's eloquent testimony to the importance of aesthetic concerns, and I find the state's desire to preserve the beauties of its natural resources a substantial, even if not compelling, interest. *See Berman v. Parker,* 348 U.S. 26, 32-33 (1954). I also agree that the statutory prohibition directly advances that interest.

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limited restriction of ideological speech by sign (as, for example, by banning all billboards on designated scenic highways or limiting their erection by zoning area) is not, of course, before us.

[5]The majority seems to assume that Maine could constitutionally enact a statute, of the same comprehensiveness as the one before us, that explicitly limits its applicability to commercial speech. Putting aside my reservations, set out *infra,* as to the seriousness of the burden this would place on commercial expression, I am not so sure as the majority that the state could openly discriminate against commercial speech in such a fashion. *See e.g., Carey v. Brown,* 48 U.S.L.W. at 4758 & n.13 (implying it an open question whether "certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction — if narrowly drawn — would be a permissible way of furthering those objectives"). *But see Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 65-70 (1976) (plurality opinion). For one thing, to permit the uninhibited use of ideological billboards undercuts, to at least some degree, the rationale for banning the erection of commercial signs. I do not imply that this is necessarily a case where the State is damned if it doesn't distinguish between commercial and ideological speech, and damned if it does. *Cf. Carey v. Brown,* 48 U.S.L.W. at 4761 (Rehnquist, J., dissenting). I merely wish to note that, for me, the question is not so easily resolved.

Anyone who frequently travels our highways for business or pleasure would probably agree that for every one billboard that is cleverly conceived, artistically executed, or especially informative, there are a dozen that are tasteless, insulting to the intelligence, or just plain ugly. It is hard to argue that many roads would not be more attractive if uncluttered by the importunities of billboard users.

My quarrel with the statute's suppression of commercial speech initially arose from my belief that its near-absolute ban is more extensive than is necessary to achieve the state's aesthetic goals. Surely it cannot be suggested that a garish billboard erected in the midst of a densely commercialized area has the same aesthetic impact as the identical billboard placed in a primeval forest. Signs and billboards are not universally incompatible with their surroundings,[6] and the state really has not attempted to show us to what degree its statute rescues areas in which the intrusion of billboards significantly spoils the existing environment. The majority's response is that the state's aesthetic goals are frustrated if *any* part of the public highway is cluttered by signs; it does not serve the legislature's purpose to condemn some areas to remain ugly, or become uglier. This point is well taken. Exempting certain portions of the roadside (as defined, perhaps, by existing zoning patterns) would undoubtedly create billboard ghettos, for those desiring to employ the medium of sign would flood all available areas until they became super-saturated with billboards. Therefore, although my doubts are not entirely quelled, I am willing to concede that the statute's broad sweep may be necessary fully to implement the state's desire to beautify and unclutter its public highways.

Once this concession is made, however, the thorniest problem with a statute banning commercial speech by sign is exposed. *Central Hudson* requires that there be a tight nexus between the desired ends and the chosen means. Here is a case where the degree of the statute's effectiveness is directly proportional to the degree it impinges on commercial speech. The

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[6]In Times Square, for example, signs are an integral aspect of the locale. Indeed, in some areas, a billboard or other sign may be the most interesting and attractive feature of the landscape, a welcome distraction from urban blight or industrial sprawl.

more grievous the burden on First Amendment rights, the more perfect the "means/ends" fit, for if we agree with the state that aesthetic concerns forbid permitting even unattractive areas to be made uglier by billboards, then we must conclude that *any* roadside sign is a threat to the statutory purpose. I believe this is a rare situation in First Amendment cases. Usually, a far-reaching, speech-suppressive statute is drawn more broadly than the state's concerns require. *E.g., Carey v. Brown,* 48 U.S.L.W. at 4758-60; *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 794-95 (1978); *Bates v. State Bar of Arizona,* 433 U.S. 350, 383-84 (1977); *Carey v. Population Services International,* 431 U.S. 678, 700-02 (1977). Such was the case in *Central Hudson* itself. *See* 48 U.S.L.W. at 4786. Thus, the Court there did not have to confront the question whether, in a case where breadth corresponds to effectiveness, the state can be required to settle for a less efficacious method in order to preserve some portion of the speech that will otherwise be lost. In other words, when the means-ends fit is *too* good, such that a gain in one value necessarily requires a loss of the other, must the state accept a compromise?

The majority would apparently answer this question "no," for the clear implication of the court's opinion is that this statute, if limited to commercial speech, would be constitutional. With deference to the erudite and thoughtful approach the court takes, I simply do not agree that the survival of commercial speech by sign can be left to the grace of Maine's legislature.

The costs imposed on the commercial speaker by this statute are great. Billboards offer a high degree of exposure for a relatively low cost. Leaflets and brochures may be comparably inexpensive, but because they cannot be obtained without the driver's active assistance — *i.e.,* stopping, pulling off at an information center, and selecting materials from an array —they do not possess the same potential for audience impact. Some travelers will choose to forego the product rather than interrupt their drive and attempt to locate the necessary information.[7] Others, who possess no conscious desire for the pro-

[7]Anyone who, feeling the urge for a snack or a cup of coffee on a long drive, has scanned fast-food restaurant billboards seeking the magic phrase "Easy on-Easy off" can probably attest to the phenomenon of desiring a product only if the cost in time and inconvenience is not too great.

duct but who would have become interested had promotional materials come to their attention, *see Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 93, will also be lost as customers.

Signs and billboards also have a unique capacity for *timely* appeals to traveling consumers. The speaker advertising by radio or newspaper and, to a certain extent, by leaflet or brochure must hope for a fortuitous coincidence of information, desire, and opportunity to act. Billboards can be placed at appropriate locations and intervals, presenting the speaker's message to the audience at a point at which they can be persuaded to act upon it. By contrast, travelers may hear the radio ad for "Mrs. Wilson's Homemade Icecream" twenty miles after they passed the turnoff to her restaurant, or they may find the brochure for Lakeside Country Inn the day after they have established themselves in another hostel.

The state has tried to alleviate these burdens somewhat by the provision of OBDS.[8] However, the value of these signs for many commercial advertisers is, to my mind, questionable.

This observation also raises questions about the right of travelling consumers to receive the commercial information imparted by billboards and signs. While this element has not been emphasized in argument and consideration of the case, it must at least be acknowledged as present and of constitutional significance. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*, 425 U.S. at 756-57. Moreover, the Supreme Court has declined to limit consideration of this interest to the situation where the information sought to be received by consumers would not otherwise be reasonably available:

> "We are aware of no general principle that freedom of speech may be abridged when the speaker's listener could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated." *Id.* at 757 n. 15.

[8]It should be noted that OBDS do not possess the same potential for timely appeals to travelers as the system of unregulated billboards they are intended to replace. No commercial entity may have more than one OBDS per public roadway leading to its establishment. The OBDS may only be located at intersections where travelers must change directions to reach the advertised product. Thus, potential consumers must be attracted through a single appeal, and they will have little opportunity to consider or discuss the desirability of the product before they must decide whether to divert from their route to seek it.

Homogeneity is the soul of the OBDS concept; through regimentation of "size, color, lighting, manner of display and lettering," 23 M.R.S.A. § 1910, the state attempts to ensure that every merchant's sign looks like the sign of every other merchant. Even with the expansion of permissible content envisioned by the majority, the opportunity for product differentiation through creative or provocative advertising is sharply curtailed. This may not matter a great deal to a Howard Johnson or a Burger King, whose name alone conjures up an entire image of the product in the reader's mind. For the small, local hotel or restaurant, however, such uniformity may leave them virtually indistinguishable from their competitors. More important, government imposed conformity treads on a cherished First Amendment value: the freedom of the speaker to clothe his message in the style and form he deems most satisfying and effective. Admittedly, this freedom is not absolute. However, its loss is an element that must be reckoned as one of the costs exacted by this statute.

Against these costs imposed on commercial speech, we must assess the benefit that accrues to Maine's citizens. Even assuming that a total ban on billboards will produce some aesthetic gain in all highway areas, the quantum of improvement will obviously vary with the site involved. In undeveloped areas, it may very well be that signs and billboards are the principal eyesores; here, the benefit will be great, for their removal would return the landscape to its pristine beauty. In industrial and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape. Without denying that some perceptible change for the better would occur even here, I question whether the margin of improvement obtained in these areas can really justify the state's decision to virtually eradicate commercial speech by sign and billboard. *Cf. Schneider v. New Jersey*, 308 U.S. at 162-63. If any one, consistent thread runs through First Amendment jurisprudence, surely it must be the recognition that the preservation of free expression is neither easy nor comfortable. It often requires of us that we tolerate things we would rather not see and endure things we would rather not hear. It requires that we accept a less-than-perfect world — a world that is not as

quiet,[9] as neat,[10] as refined,[11] or even, I believe, as scenic as we might like.

In my view, therefore, Maine could not save this statute by limiting its application to commercial speech. I do not believe that *Central Hudson* was intended to preclude a balancing test when a statute imposes a near-total ban on one medium of communication. *Cf. Martin v. Struthers,* 319 U.S. 141 (1943); *Schneider v. New Jersey,* 308 U.S. 147 (1939). Perhaps a different case would be presented were the billboard ban limited to selected scenic highways or to areas not zoned for industrial or commercial development.[12] Undeniably, such an approach would be a less thorough vindication of the state's aesthetic concerns; it would have the virtue, however, of allowing those concerns to coexist with First Amendment values without imposing a grievous burden on either interest.

One final point must be made. The majority finds it easier to approve the state's attempts at fullscale restriction of signs and billboards because "deprivation of highway opportunities is not as legally objectionable as some other curtailments." This seems to me somewhat of an inversion of the traditional approach in First Amendment cases. "[S]treets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Carey v. Brown,* 48

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[9] *See, e.g., Saia v. New York,* 334 U.S. at 561-62 (loudspeakers).

[10] *E.g., Schneider v. New Jersey,* 308 U.S. at 162 ("the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.").

[11] *E.g., Carey v. Population Services International,* 431 U.S. 678, 700-01 (1977) (advertising and display of contraceptive devices); *Cohen v. California,* 403 U.S. at 24-25 (jacket inscribed with vulgar phrase).

[12] I do not believe that a system of selective restrictions would be as difficult to formulate as my brother fears. The existing zoning codes represent governmental decisions about land use priorities. They might be readily adapted to serve as the basis of sign and billboard regulations. Designation of some public roads as scenic highways also seems a reasonable, and reasonably easy, method of selective restriction. Some states, as well as some private travel associations, have already made such assessments.

U.S.L.W. at 4757, *quoting Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968). *See Schneider v. New Jersey*, 308 U.S. at 163 ("the streets are natural and proper places for the dissemination of information and opinion."). Although use of the streets by merchants extolling their wares and services may not have the same place in the hierarchy of First Amendment values as does the activity of social reformers and political dissidents,[1] it is a practice equally time-honored. Plaintiffs here do not demand that the state permit government property to be appropriated to their use. *Cf. Greer v. Spock*, 424 U.S. 828 (1976); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion). *See Consolidated Edison Co. v. Public Service Commission*, 48 U.S.L.W. at 4778. They seek merely the right to continue using privately owned land to communicate with highway travelers. Certainly, public roadways are not created for the convenience of advertisers. However, since we have rejected the suggestion that commercial speakers obstruct or make perilous the intended use of the roadways, I do not see that the state has any greater power to prevent speakers from reaping the incidental benefits of public congregation on the highways than it has to restrict their access to an audience gathered in any other public place.

For all these reasons, then, I join in the court's conclusion that the Maine Traveler Information Services Act is unconstitutional, but I cannot subscribe to the suggestion that an equally sweeping ban levelled against commercial speech by sign would be acceptable.

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[1] *But see The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 165-68 (1980) (arguing that there is no principled basis for affording commercial speech a lesser degree of constitutional protection).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

JOHN DONNELLY & SONS, ET AL.,	:	
	:	
Plaintiffs	:	
v.	:	CIVIL NO. 77-284-SD
	:	
ROGER L. MALLAR, Commissioner of Transportation, State of Maine,	:	
	:	
Defendant	:	

OPINION AND ORDER

GIGNOUX, J.

In this action plaintiffs John Donnelly & Sons, National Advertising Company, and William S. Schaeffer challenge the constitutional validity of the recently enacted Maine Traveler Information Services Act, 23 M.R.S.A. §§ 1901-1925 (the "Maine Act" or the "Act") and seek declaratory and injunctive relief against defendant Roger L. Mallar who, as Commissioner of Transportation for the State of Maine, is charged with enforcement of the Act.

The Act provides, *inter alia,* for the state-wide elimination of off-premises, outdoor "billboard" advertising.[1] Plaintiffs, two national billboard companies which operate in Maine, and one of their employees, have challenged the Act on the grounds that it violates the First Amendment to the United States Constitution (First Claim of the complaint), that it constitutes an in-

[1]The Act was scheduled to become effective on January 1, 1978. Plaintiffs commenced the instant litigation shortly before the effective date. In order to preserve the status quo, plaintiffs have agreed not to erect any new billboards and defendant has agreed not to commence the removal of any billboards pending the outcome of this suit.

valid exercise of the police power in contravention of the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Second Claim of the complaint), that it deprives plaintiffs of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution (Third Claim of the complaint), and that the state is barred by the doctrine of equitable estoppel from requiring the removal of plaintiffs' billboards (Fourth Claim of the complaint). Jurisdiction is asserted under 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202, and under the doctrine of pendent jurisdiction.

Currently before the Court are the parties' cross-motions for summary judgment on the First, Second, and Fourth Claims of the complaint.[2] For the reasons set forth below, the Court holds that the Act does not violate plaintiffs' First Amendment rights (First Claim), that the Act does not constitute an invalid exercise by the State of its police power (Second Claim), and that the State is not barred by the doctrine of equitable estoppel from requiring the removal of plaintiffs' billboards (Fourth Claim).

I

The factual and statutory background is uncomplicated and undisputed. At present there exist approximately 2520 off-premises billboards in the State of Maine, about half of which are standardized as to size and design and about half of which are not standardized. Though the vast majority of the billboards owned and operated by plaintiffs and other outdoor advertisers doing business in the State display signs purely commercial in nature, a number of billboards carry messages dealing with political, civic, religious and charitable subjects.

The purposes of the Act, as expressed in the legislative findings and statement of policy and purposes, 23 M.R.S.A. §§ 1901 and 1902, are threefold. First, the Act seeks to preserve and promote the general scenic character of the State of Maine.

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[2]By agreement of the parties, the question of whether the Act, on its face or as applied to plaintiffs, deprives them of their property without just compensation in violation of the Fifth and Fourteenth Amendments (Third Claim of the complaint) is not presently before the Court because of the need for further discovery.

§ 1902(4). The Maine Legislature expressly found that scattered outdoor advertising throughout the State is detrimental to the preservation of the State's scenic resources. § 1901(4). Second, the Act is intended to preserve the State's scenic beauties not only for their aesthetic value but because the visual attractiveness of the State substantially promotes tourism, one of the State's major industries, as well as its general economic and cultural development. § 1901(1), (3) and (4). Finally, the Act is intended to promote highway safety by eliminating distractions to motorists § 1901(5).

To achieve these objectives, the Act prohibits the erection or maintenance of signs visible from any public way, 23 M.R.S.A. § 1908, with three general exceptions. First, the Act permits on-premises advertising not containing moving parts or flashing lights, subject to certain restrictions as to size, height, placement and number of signs. 23 M.R.S.A. § 1914. Second, in order to provide a means of disseminating information to the traveling public with respect to business facilities and points of historical, recreational, or cultural interest, the Act empowers the Commissioner to establish a system of "official business directional signs." 23 M.R.S.A. § 1906. Though these signs may be located off-premises, they are regulated as to type, size, location, color, lighting, and number. 23 M.R.S.A. §§ 1909-1912. In addition, the Commissioner is also to provide traveler information directories, guidebooks and maps and to establish tourist information centers at principal entrance points into the State. 23 M.R.S.A. §§ 1907, 1905. Finally, the Act exempts from its ban certain classes of off-premises signs including signs erected by churches and civic, historical and cultural organizations, signs promoting fairs and expositions, and signs which serve public functions. 23 M.R.S.A. § 1913. Included in the latter category are signs which pertain to activities such as charity drives and political campaigns. 23 M.R.S.A. § 1913(9).[3]

The Act provides two means for the removal of nonexempt off-premises billboards. The owners of signs located along the interstate or primary highway systems are to be compensated

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[3]That § 1913(9) includes political advertising within its scope is made clear by the legislative history of the Act. *1977 Maine Legislative Record* at 2032 (1977).

with billboard removal funds made available to the State by the federal government pursuant to the Highway Beautification Act of 1965, as amended, 23 U.S.C. § 131 *et seq.* (1976). 23 M.R.S.A. § 1915. Those signs eligible for such compensation are to be removed within four years of the effective date of the Act. 23 M.R.S.A. § 1921. All other nonexempt billboards are to be amortized over six years from the effective date of the Act; that is, they are to be permitted to remain in place until January 1, 1984, by which time the owners are assumed to have recouped their investments through profits. 23 M.R.S.A. § 1916.

II

Plaintiffs claim that by prohibiting the erection or maintenance of off-premises billboards, the Act impermissibly infringes upon their First Amendment guarantee of freedom of speech made applicable to the States by the Fourteenth Amendment. *Bigelow v. Virginia,* 421 U.S. 809, 811 (1975); *Gitlow v. New York,* 268 U.S. 652, 666 (1919). Plaintiffs anchor their First Amendment argument in the series of recent United States Supreme Court cases which have accorded commercial speech a measure of the protection previously reserved for so-called "pure" or noncommercial speech. *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Carey v. Population Services International,* 431 U.S. 678 (1977); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977); *Virginia Pharmacy Board v. Virginia Consumers Council,* 425 U.S. 748 (1976); *Bigelow v. Virginia, supra.* The State, however, does not defend the Act on the ground that it affects merely commercial speech.[4] Rather, the State argues, and the Court agrees, that the Act is a permissible regulation of the time, place and manner of speech, having only a constitutionally permissive "incidental effect" on that activity.[5]

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[4]Indeed, the State would have difficulty labeling the Act as a regulation of only commercial speech since some 24% of the messages carried on John Donnelly & Sons billboards and some 5% of the National Advertising Company signs are noncommercial in nature.

[5]As defendant points out, while the Supreme Court has held that commercial speech falls within the ambit of the First Amendment, the Court has been careful neither to hold that commercial speech "is wholly undifferentiable

The power of a state or local government to regulate the time, place, or manner of speech is of long-standing duration, *Cantwell v. Connecticut,* 310 U.S. 296 (1940), and of continuing validity, *Linmark Associates, Inc. v. Willingboro, supra* at 93-94; *Virginia Pharmacy Board v. Virginia Consumer Council, supra* at 771. To constitute a legitimate time, place or manner restriction, a regulation must satisfy three criteria: (1) the restriction on speech must be "justified without reference to the content of the regulated speech," (2) the restriction must "serve a significant governmental interest," and (3) in so doing, the restriction must "leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board v. Virginia Consumer Council, supra; see Linmark Associates, Inc. v. Willingboro, supra; see also United States v. O'Brien,* 391 U.S. 367, 377 (1968). The Maine Act meets this three-pronged test.

A. The Act neither has the purpose nor the effect of regulating the content of speech. None of the express purposes of the Act — the enhancement of the State's scenic resources, the development of tourism and other economic growth, and the promotion of highway safety — pertain to the subject matter of a message displayed on an off-premises billboard. Nor

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from other forms" of speech nor to discard the "common-sense" differences between speech which proposes a commercial transaction and other varieties of speech. *Virginia Pharmacy Board v. Virginia Consumer Council, supra* at 771 n. 24. The Court has made clear that, although entitled to a certain degree of constitutional protection, commercial speech does not enjoy the same preferred position as does noncommercial speech, a distinction recently elucidated in *Ohralik v. Ohio State Bar Association,* U.S. , 46 U.S.L.W. 4511 (May 30, 1978):

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

ID. at 4513-14.

do the various regulatory provisions of the Act purport to prohibit a particular message content. The purpose and effect of the Maine Act is to eliminate off-premises advertising, not to prohibit the transmission of any particular message. When ordinances or statutes attempt to regulate the content of speech, courts are swift to hold such restrictions unconstitutional. *E.g., Linmark Associates, Inc. v. Willingboro, supra* (municipal ordinance banning "For Sale" or "Sold" signs on homesites); *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977) (city ordinances restricting, *inter alia,* the display of "political campaign signs"); *Peltz v. City of South Euclid,* 228 N.E.2d 320 (Ohio 1967) (city ordinance prohibiting all "political signs"). On the other hand, although the Supreme Court has never ruled on the constitutionality of comprehensive anti-billboard legislation,[6] every state court which has considered whether such a law violates the First Amendment has sustained it. *Suffolk Outdoor Advertising Co. v. Hulse,* 402 N.Y.S. 2d 368, 370 (N.Y. 1977); *Donnelly Advertising Corp. v. Baltimore,* 370 A.2d 1127, 1131-32 (Md. 1977); *John Donnelly & Sons v. Outdoor Advertising Board,* 339 N.E.2d 709, 721-22 (Mass. 1975); *Markham Advertising Co. v. State,* 439 P.2d 248, 262-63 (Wash 1968), *appeal dismissed for want of a substantial federal question,* 393 U.S. 316 (1969); *Ghaster Properties, Inc. v. Preston,* 200 N.E.2d 328, 338 (Ohio 1964); *United Advertising Corp. v. Raritan,* 93 A.2d 362, 366 (N.J. 1952) (Brennan, J.). Because the Act is not directed against the content of any messages, it meets the first component of the "time, place, or manner" test.

B. The speech restrictive aspects of the Act serve significant governmental interests.[7] In challenging the

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[6] In *Linmark Associates, Inc. v. Willingboro, supra,* the Court expressly refrained from deciding "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Id.* at 94 n.7.

[7] As the parties agree, the question of whether the Act serves a "significant

legitimacy of the governmental interests which the Act seeks to advance — the preservation of aesthetic values, the development of tourism and other economic growth, and the promotion of highway safety —, plaintiffs particularly attack the aesthetic considerations on which it is grounded. Plaintiffs claim that aesthetics alone is an insufficient basis for the enactment of such legislation. To be sure, at one time the mere preservation of aesthetic values was not deemed to be a governmental interest sufficient to sustain laws regulating billboards and similar outdoor signs. *Wolverine Sign Works v. Bloomfield Hills,* 271 N.W. 823, 825 (Mich. 1937); *Varney & Green v. Williams,* 100 P. 867, 868 (Cal. 1909). Indeed, the minority view still adheres to the position that aesthetics alone does not justify comprehensive anti-billboard legislation. *Baltimore v. Mano Swartz, Inc.,* 299 A.2d 828, 832 (Md. 1973); *Stoner McCray System v. Des Moines,* 78 N.W.2d 843, 847-48 (Iowa 1956); *see also Montgomery County v. Citizens Building & Loan Association, Inc.,* 316 A.2d 322, 325 (Md. Ct. Spec. App. 1974). The emerging majority position, however, and the one to which this Court subscribes, is that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation such as the Maine Act. *Suffolk Outdoor Advertising Co. v. Hulse, supra* at 371; *John Donnelly & Sons v. Outdoor Advertising Board, supra* at 717-19; *Markham Advertising Co. v. State, supra* at 258-60; *Ghaster Properties, Inc. v. Preston, supra* at 337. As Mr. Justice Douglas presciently observed several years ago:

> The concept of public welfare is broad and inclusive. The values it represents are

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governmental interest" is identical to that of whether the Act furthers a "legitimate legislative objective." The latter standard, of course, is a vital element in the determination of whether a statute constitutes a valid exercise of the police power. *Goldblatt v. Hempstead,* 369 U.S. 590, 594-95 (1962), discussed *infra* at Part III.

> spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33 (1954); *see also Belle Terre v. Boraas*, 416 U.S. 1, 5-6 (1974). The nation's recently-awakened and growing concern for the quality of its environment and the various and widespread steps taken by individuals, citizen groups, and governmental bodies to protect and enhance natural resources demonstrate beyond reasonable question that the Maine Act serves substantial governmental interests through the preservation of aesthetic values.[8]

Furthermore, when aesthetic considerations are linked to economic consequences, such as the preser-

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[8]It also should be noted that the Supreme Court has consistently sustained reasonable regulation of speech which, regardless of the content of the messages being transmitted, involves unavoidable intrusions into the privacy of the recipients of the messages. In *Kovacs v. Cooper*, 336 U.S. 77 (1949), a seminal case, the Court sustained an ordinance prohibiting the use of sound trucks precisely because the individual receiving the messages was "practically helpless to escape this interference with his privacy." *Id.* at 86-87. The fact that recipients of billboard messages are in a similar position to recipients of sound truck messages was first noted by Mr. Justice Brandeis in *Packer Corp. v. Utah*, 285 U.S. 105 (1932), in which he quoted the words of a lower court that,

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the messages of billboards thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard. . . .

Id. at 110, quoted with approval in *Lehman v. Shaker Heights*, 418 U.S. 298, 302 (1974). It is evident that billboards fall within this category of intrusive speech. *John Donnelly & Sons v. Outdoor Advertising Board, supra* at 721-22.

vation of property values or the promotion of tourism and the fostering of general economic growth, there can be no doubt but that substantial governmental interests are served. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Wright v. Michaud*, 160 Me. 164, 173 (1964). Plaintiffs appear to overlook the fact that a primary goal of the Act is economic in nature, that aesthetics is directly coupled with development of the State's vital tourist industry. The promotion of tourism manifestly is a valid legislative objective. *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1151 (5th Cir.), *cert. denied*, 400 U.S. 805 (1970). Even those jurisdictions which are reluctant to endorse the preservation of aesthetic values alone as a proper basis for the exercise of the police power recognize that when legislation based on aesthetic considerations also promotes economic growth, a significant governmental interest is served. *Donnelly Advertising Corp. v. Baltimore, supra* at 1133-34; *Metromedia, Inc. v. San Diego*, 136 Cal. Repr. 453, 457 (Cal. Ct. App. 1977). Both because aesthetics itself appropriately may be the object of governmental regulation, and because the Maine Act not only promotes aesthetic values but also seeks to foster economic growth, the Act serves a significant governmental interest, and thus satisfies the second part of the "time, place, or manner" test.*

C. The Act leaves open ample alternative channels for communication of the information now carried by off-premises outdoor advertising. Plaintiffs argue

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*Clearly, as plaintiffs concede, the promotion of highway safety is a proper basis for the exercise of the police power. *Markham Advertising Co. v. State, supra* at 258; *E.B. Elliott Advertising Co. v. Metropolitan Dade County, supra* at 1151-52. Plaintiffs argue, however, that the Maine Legislature could not reasonably have found that the elimination of off-premises billboards will promote traffic safety. Since the Court concludes that the aesthetic and aesthetic-economic objectives of the Act provide a sufficient basis for the exercise of the State's police power, the Court need not explore the relationship between billboards and highway safety.

that billboards are a "unique and distinct medium of mass communication," which will be destroyed by the Maine Act, thus leaving the users of the medium no alternative for the communication of their messages. They essentially make the point that billboards serve a useful function in conveying information to travelers on the highways as to the direction and distance to motels, restaurants, tourist attractions and other points of interest, and that for this purpose billboards have two advantages over other media: their low cost and their geographic selectivity. The Maine Act, however, recognizes this fact and makes special provision for alternative means for the communication of information to travelers such as is currently conveyed by off-premises billboards. Many, if not all, of the commercial messages displayed on off-premises signs can be conveyed to the traveling public through on-premises advertising, official business directional signs, and tourist information centers and publications, all of which are sanctioned by the Act. 23 M.R.S.A. § 1914; §§ 1906, 1909-1912; §§ 1905, 1907. Moreover, noncommercial messages such as those conveyed by political, civic and charitable signs, are specifically exempted from the broad ban on off-premises advertising. 23 M.R.S.A. § 1913(9). Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether, and thus remain available for commercial and noncommercial advertising alike.[10] In short, the Maine Act clearly leaves open numerous alternative channels for com-

[10]Though plaintiffs stress the importance of outdoor signs as an advertising and communications medium, it is instructive to note that in 1977, only 1.2% of all advertising expenditures were for outdoor advertisements. *1977 Statistical Abstract of the United States* at 845 (1977). This percentage represents a decline from 1968 when 1.6% of advertising expenditures were directed toward outdoor media. *John Donnelly & Sons, Inc. v. Outdoor Advertising Board, supra* at 721, n.15. The overwhelming majority of advertisers thus already avail themselves of alternative modes of communication.

> munication of the information now carried by off-premises billboards. It thus meets the third prong of the "time, place or manner" test.

The Maine Act constitutes a valid regulation of the time, place and manner of speech; plaintiffs' attack on First Amendment grounds accordingly must fail.

III

Plaintiffs' claim that the Maine Act constitutes an invalid exercise of the police power is equally without merit. It is firmly established that in determining whether a statute constitutes a valid exercise of the police power, the court must engage in a two-step analysis: first, the court must determine whether the statute is in furtherance of a legitimate legislative objective, and, second, the court must determine whether the means employed are reasonably related to the furtherance of that objective. In *Goldblatt v. Hempstead,* 369 U.S 590 (1962), the Supreme Court succinctly framed the appropriate inquiry:

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 594-95, *quoting with approval Lawton v. Steele,* 152 U.S. 133, 137 (1894). *See also Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it may be thought that the particular legislative measure was a rational way to correct it.").

Furthermore, in applying this test, the court is to exercise great restraint:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . The role of the judiciary in determining whether [legislative] power is being exercised for a public purpose is an extremely narrow one.

Berman v. Parker, 348 U.S. 26, 32 (1954). *See also Sproles v. Binford*, 286 U.S. 374, 388 (1932) ("[D]ebatable questions as to reasonableness are not for the courts but for the legislatures . . .").

Under the foregoing standards,[11] the Maine Act unquestionably constitutes a valid exercise of the police power.

A. The Act is in furtherance of legitimate legislative objectives. As demonstrated in Part II, B, *supra*, both the aesthetic and the economic purposes of the Act serve significant governmental interests and constitute a proper basis for the exercise by the State of its police power. *Berman v. Parker, supra* at 33; *Suffolk Outdoor Advertising Co. v. Hulse, supra* at 370-71; *Donnelly Advertising Corp. v. Baltimore, supra* at 1133-34; *John Donnelly & Sons v. Outdoor Advertising Board, supra* at 716-19; *Markham Advertising Co. v. State, supra* at 258-60; *Ghaster Properties, Inc. v. Preston, supra* at 337; *Metromedia, Inc. v. San Diego, supra* at 457.

B. The means employed by the State are reasonably related to the furtherance of the Act's objectives. Plaintiffs' principal challenge to the means which the State has adopted to implement the Act's objectives is that the state-wide ban on off-premises billboards is geographically overbroad and patently unreasonable. The substantial majority of courts which have considered geographically comprehensive anti-billboard legislation, however, have sustained the legislation as reasonable and proper exercises of the

[11] Other questions suggested by plaintiffs, such as whether the statute abolishes a "legitimate business" or deprives an owner of his property and whether the public gains outweigh the private losses, may be appropriately raised, if at all, in the consideration of plaintiffs' claim that the Maine Act deprives them of their property without just compensation in violation of the Fifth and Fourteenth Amendments (Third Claim of the complaint), an issue which, by agreement of the parties, is not currently before the Court. The question of whether the Maine Act constitutes an invalid exercise of the police power in violation of the Due Process Clause of the Fourteenth Amendment is distinct from the question of whether the Act, on its face or as applied to plaintiffs, deprives them of their property without just compensation in violation of the Fifth and Fourteenth Amendments.

police power. *Suffolk Outdoor Advertising Co. v. Hulse, supra; Donnelly Advertising Corp. v. Baltimore, supra; John Donnelly & Sons v. Outdoor Advertising Board, supra; Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975); *Markham Advertising Co. v. State, supra; Cromwell v. Ferrier*, 225 N.E.2d 749 (N.Y. 1967); *Ghaster Properties, Inc. v. Preston, supra; United Advertising Corp. v. Raritan, supra; United Advertising Corp. v. Metuchen*, 198 A.2d 447 (N.J. 1964); *Murphy, Inc. v. Westport*, 40 A.2d 177 (Conn. 1944). Plaintiffs endeavor to distinguish these cases on the ground that the geographical areas in question were small, residential communities without significant commercial or industrial sections.[12] Plaintiffs instead place heavy emphasis on several state court opinions which have struck down billboard legislation in whole or in part because of the extensive geographical breadth of the legislation in question. *See Metromedia, Inc. v. San Diego, supra* at 460 (City of San Diego); *Combined Communications Corp. v. Denver*, 542 P.2d 79, 81-83 (Colo. 1975) (City and County of Denver); *Norate Corp. v. Zoning Board of Adjustment*, 207 A.2d 890, 895-96 (Pa. 1965) (Upper Moreland Township, Pa.). In essence, plaintiffs concede that a state or local government may ban all billboards in suburban, residential, or rural areas, but argue that they may not prohibit billboards in urban, commercial or industrial areas.

Plaintiffs' attempt to differentiate between areas which may be preserved and improved aesthetically and those which may not is wholly unpersuasive. The Court can find no rational basis for concluding, as plaintiffs would suggest, that residents of and visitors to urban, commercial or industrial districts are not entitled to the benefit of an aesthetically pleasing environment, while those living in or visiting suburban,

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[12]Plaintiffs assert that no court has ever sustained a state-wide ban on off-premises billboards. It appears, however, that only one other state, Vermont, has enacted a similar law, and Vermont's statute has not yet been challenged.

residential or rural regions are. Indeed, the Maine Legislature might reasonably conclude that just as the scenic beauty of country and coastal areas promotes tourism, improving the aesthetic quality of business districts helps attract new businesses and contributes to general economic development. *See John Donnelly & Sons v. Outdoor Advertising Board, supra* at 720. This Court agrees with the views expressed by the Supreme Judicial Court of Massachusetts in *John Donnelly & Sons v. Outdoor Advertising Board, supra,* that "[w]hether an area is urban, suburban, or rural should not be determinative of whether the residents are entitled to preserve and enhance their environment. . . . [T]o conclude that an area is too unattractive to justify aesthetic improvement would be both unreasonable and illogical."

The Maine Act's state-wide prohibition of off-premises billboards is an appropriate means of accomplishing the Act's objectives.

The Maine Act is in furtherance of legitimate legislative objectives and the means employed are reasonably related to the furtherance of those objectives; plaintiffs' challenge to the Act on the ground that it constitutes an invalid exercise of the police power accordingly must fail.[13]

IV

Plaintiffs' final claim is that the State is barred by the doctrine of equitable estoppel from requiring the removal of plaintiffs' billboards. Plaintiffs assert that, because prior legislation

[13]Throughout their brief, plaintiffs cite a number of cases invalidating anti-billboard statutes or ordinances on grounds not now raised in this case. These include cases finding ordinances to be *ultra vires* a municipality's charter, *e.g., Combined Communications Corp. v. Denver, supra; Dolson Outdoor Advertising Co. v. Macomb,* 360 N.E.2d 805 (Ill. App. Ct. 1977); cases invalidating anti-billboard legislation on Equal Protection grounds, *e.g., Metromedia, Inc. v. Des Plaines,* 326 N.E.2d 59 (Ill. App. Ct. 1975); and cases striking down statutes as unconstitutional takings of property without compensation, *e.g., Stoner McCray System v. Des Moines, supra* at 849-50. These cases are not relevant to the issues presently before this court.

authorized permits for off-premises billboards, and because plaintiffs in reliance upon the permit system expended substantial sums of money in the erection of billboards, the State is now foreclosed from enforcing the current Act. The short answer to this contention is that the common law of the State of Maine, which, as the parties agree, the Court must apply to this question, is in accord with the general rule that when the legislature acts in its governmental or sovereign capacity, as opposed to a business or proprietary role, the doctrine of estoppel is inapplicable. *Dolloff v. Gardiner,* 148 Me. 176, 186-87 (1952); *Milo v. Milo Water Co.,* 131 Me. 372, 378-79 (1932). Enacted pursuant to the police power in order to promote the public welfare, the Maine Act falls squarely within this rule.

Moreover, even if the estoppel doctrine were applicable to this case, there is no factual basis upon which an estoppel could be successfully asserted to preclude the State from enforcing the Act. The State neither proposes to revoke extant permits, nor does it plan to breach any present or future public commitments upon which plaintiffs may have relied. *Cf. Stoner McCray Systems v. Des Moines, supra* at 848-49. The permits which plaintiffs and other outdoor advertisers were required to obtain under the Outdoor Advertising Act of 1969, which the new Act has superseded, were annual permits only and expired at the end of each calendar year. 1969 Me. Acts, c. 257, §§ 2713, 2714. The State, therefore, has made no representation that plaintiffs' billboards could remain in place forever. There simply exist no grounds for concluding that doctrines of equity should prevent the State from implementing the present Act.

* * *

Defendant's motion for summary judgment on Counts I, II and IV of the complaint is granted, and plaintiffs' motion for partial summary judgment is denied.

IT IS SO ORDERED.

Dated at Portland, Maine, this 11th day of July 1978.

/s/ Edward T. Gignoux

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

SOUTHERN DIVISION

Civil No. 77-284-SD

JOHN DONNELLY & SONS, et. al.,:		
Plaintiffs,	:	
v.	:	ORDER
ROGER L. MALLAR,	:	
Defendant.	:	

This matter having come before the Court upon the Stipulation of the parties and the Court being fully advised, it is

ORDERED, ADJUDGED AND DECREED that based upon the Opinion and Order of this Court dated July 11, 1978, the Clerk shall enter a final judgment dismissing, with prejudice, the First, Second and Fourth Claims for Relief and so much of the Fifth Claim for Relief as is based on the First, Second and Fourth Claims of the Complaint and the action therein; that the Third Claim for Relief of the Complaint and action and only that claim of the Fifth Claim for Relief which seeks a permanent injunction based on the Third Claim be dismissed without prejudice; that any claims of the Fifth Claim for Relief which seek a temporary restraining order or preliminary injunction based on the Third Claim for Relief be dismissed with prejudice; and that each party shall bear its own costs.

Dated at Bangor, Maine, this 20th day of September, 1979.

/s/ Edward T. Gignoux
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Civil No. 79-1575

JOHN DONNELLY & SONS, et al.,	:	
	:	
Plaintiffs-Appellants,	:	
v.	:	NOTICE OF APPEAL
	:	
GEORGE N. CAMPBELL, JR.,	:	
	:	
Defendant-Appellee.	:	

George N. Campbell, Jr., Defendant-Appellee in the above-encaptioned action, hereby appeals to the United States Supreme Court, pursuant to 28 U.S.C. § 1254(2), the judgment of the United States Court of Appeals for the First Circuit entered on December 22, 1980.

Dated: January 7, 1981.

/s/ Cabanne Howard
Senior Assistant Attorney General
Attorney for Defendant-Appellee
State House
Augusta, Maine 04333
(207) 289-3051

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1575.

JOHN DONNELLY AND SONS, et al.,
Plaintiffs, Appellants,

v.

GEORGE N. CAMPBELL, JR., ETC.,
Defendant, Appellee.

ORDER OF COURT

Entered: January 9, 1981

Upon motion of appellee,

It is ordered that mandate is hereby stayed pending disposition by the United States Supreme Court of appellee's appeal.

By the Court:

/s/ Dana H. Gallup
Clerk

APPENDIX F

CHAPTER 21

MAINE TRAVELER INFORMATION SERVICES

§ 1901. Legislative findings

The Legislature of the State of Maine makes the following findings of fact.

1. Tourist industry. A large and increasing number of tourists has been coming to Maine, and as a result the tourist industry is one of the important sources of income for Maine citizens, with an increasing number of persons directly or indirectly dependent upon the tourist industry for their livelihood.

2. Information discrimination. Very few convenient means exist in the State to provide information on available public accommodations, commercial services for the traveling public and other lawful businesses and points of scenic, historic, cultural, educational and religious interest. Provision of those facilities can be a major factor in encouraging the development of the tourist industry in Maine.

3. Scenic resources. Scenic resources of great value are distributed throughout the State, and have contributed greatly to its economic development by attracting tourists, permanent and part-time residents, and new industries and cultural facilities.

4. Preservation of scenic resources. The scattering of outdoor advertising throughout the State is detrimental to the preservation of those scenic resources, and so to the economic base of the State, and is also not an effective method of providing information to tourists about available facilities.

5. Proliferation of outdoor advertising. The proliferation in number, size and manner of outdoor advertising is hazardous to highway users.

§ 1902. Policy and purposes

To promote the public health, safety, economic development and other aspects of the general welfare, it is in the public in-

terest to provide tourists and travelers with information and guidance concerning public accommodations, facilities, commercial services and other businesses, and points of scenic, cultural, historic, educational, recreational and religious interest. To provide this information and guidance, it is the policy of the State and the purpose of this chapter to:

1. Official information centers; signs. Establish and maintain official information centers and a system of official business directional signs;

2. Information publications. Provide official directories, guidebooks, maps and other tourist and traveler information publications;

3. Control outdoor advertising. Prohibit and control the indiscriminate use of outdoor advertising; and

4. Protection of scenic beauty. Enhance and protect the natural scenic beauty of the State.

§1903. Definitions

As used in this chapter, unless the context otherwise indicates, the following words shall have the following meanings.

1. Commissioner. "Commissioner" means the Commissioner of Transportation.

2. Erect. "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw or in any other way bring into being or establish.

3. Interstate system or interstate highway. "Interstate system" or "interstate highway" means any state highway which is or does become part of the national system of interstate or defense highways, as described in the United States Code, Title 13, section 103(d) and amendments thereto or replacements thereof.

4. Logo. "Logo" means a single or multicolored symbol or design used by a business as a means of identifying its products or services.

5. Maintain. "Maintain" means to allow to exist.

6. Motor vehicle. "Motor vehicle" means a self-propelled vehicle capable of legal operation on the traveled portion of the state highways.

7. Official business directional sign. "Official business directional sign" means a sign erected and maintained in accordance with this chapter, to indicate to the traveling public the route and distance to public accommodations, facilities, commercial services for the traveling public and points of scenic, historical, cultural, recreational, educational and religious interest.

8. On-premise sign. "On-premise sign" means a sign which is erected and maintained according to the standards set forth in section 1914 upon the same real property that the business, facility or point of interest is located or an approach sign as permitted by section 1914, subsection 10. The signs shall only advertise the business, facility or point of interest conducted thereon or the sale, rent or lease of the property upon which it is located.

9. Person. "Person" means an individual, corporation, joint venture, partnership or any other legal entity.

10. Primary system or primary highway. "Primary system" or "primary highway" means any state highway which is or does become part of the federal aid primary system, as described in the United States Code, Title 23, section 103(b) and amendments thereto and replacement thereof.

10-A. Private way. "Private way" means a private road, driveway or public easement as defined in section 3021.

11. Public way. "Public way" means any road capable of carrying motor vehicles, including, but not limited to, any state highway, municipal road, county road, unincorporated territory road or other road dedicated to the public.

12. Residential directional sign. "Residential directional sign" means an off-premise sign erected and maintained by an individual to indicate the location of his residence.

13. Secondary system or secondary highway. "Secondary system" or "secondary highway" means any state highway, but which is not part of the interstate or primary systems.

14. Sign. "Sign" means any structure, display, logo, device or representation which is designed or used to advertise or call attention to any thing, person, business, activity or place and is visible from any public way. It does not include the flag, pennant or insignia of any nation, state or town. Whenever dimensions of a sign are specified they shall include frames.

15. State highway or highway. "State highway" or "highway" means any public way which is so designated by this Title, including interstate, primary and secondary highways.

16. Traffic control sign or device. "Traffic control sign or device" means an official route marker, warning sign, sign directing traffic to or from a community, bridge, ferry or airport, or sign regulating traffic, which has been erected by officers having jurisdiction over the public way and these signs shall be exempt from the requirements of this chapter.

17. Visible. "Visible" means capable of being seen without visual aid by a person of normal visual acuity.

§ 1904. Travel Information Advisory Council.

1. Creation. The Travel Information Advisory Council is created. The commissioner shall cooperate with the council by providing necessary assistance.

2. Powers and duties. The Travel Information Advisory Council shall advise the commissioner on rules relating to the determination of location, size, color and lettering for official business directional signs and on all other matters necessary and appropriate for the administration of this chapter.

3. Membership. The Travel Information Advisory Council shall have 8 members as follows: One representing the lodging industry, one representing the restaurant industry, one representing the recreational industry, one representing the Keep Maine Scenic Committee, one representing agriculture, one representing environmental organizations, one representing non-profit historical and cultural institutions and one representing the general public. The members shall be appointed by the Governor, one of whom he shall designate as chairman. The 8 initially appointed members shall be ap-

pointed as of the effective date of this chapter, with 4 appointed for one-year terms, and 4 appointed for 2-year terms. New members shall be appointed annually thereafter to 2-year terms. If a vacancy occurs prior to the expiration of a term, that vacancy shall be filled for the remainder of that term. Meetings shall be held at the call of the chairman or at the call of more than ½ of the membership. Members of the council, except state employees, shall receive $25 per day for their services at meetings and all members shall receive necessary traveling expenses for attending all meetings of the council. All council expenses shall be paid from the fund established by section 1919.

§ 1905. Official tourist information centers

To the extent funds are available or contracts can be entered into, the commissioner shall establish official tourist information centers near the principal entrance points into the State, as determined by the commissioner, and at such other locations as the commissioner deems appropriate in order to provide information about public accommodations, facilities, commercial services and other businesses for the traveling public, and points of scenic, historic, cultural, recreational, educational and religious interest.

§ 1906. Official business directional signs

1. Erection and maintenance. The commissioner, with the advice of the Travel Information Advisory Council, shall designate locations for and erect official business directional signs licensed under this chapter. The official business directional signs shall be furnished and preserved by the applicant thereafter and shall conform to regulations issued by the commissioner with the advice of the Travel Information Advisory Council. Such regulations shall be consistent with section 1910.

2. Agreements with municipalities. The commissioner may enter into such contractual or other arrangements as he may consider appropriate under the circumstances with any municipality of this State providing for the erection within that municipality of official business directional signs which may be distinctive to that municipality for the administration of such official business directional signs, or for any other matter

arising under this chapter which the commissioner considers appropriate to be administered by that municipality. Any such arrangeme t or agreement and all actions taken in accordance with such arrangement or agreement shall be with the advice of the Travel Information Advisory Council and shall comply with this chapter and with the regulations adopted pursuant thereto.

§ 1907. Published information

To the extent funds are available or contracts are entered into, the commissioner shall provide directories, guidebooks, maps and other published information, showing the location of routes and available public accommodations, facilities, commercial services for the traveling public and other businesses and points of scenic, recreational, historic and cultural interest. He may include in those guidebooks, and other published materials, paid advertising, identified as such, and shall make them available to visitors and to the general public at information centers and booths, service stations and garages, hotels, motels and restaurants, historical attractions and educational facilities, and such other places as he may find desirable. The commissioner shall cooperate with other state, federal and local agencies that provide information to travelers in the administration of this section.

§ 1908. Regulation of outdoor advertising

No person may erect or maintain signs visible to the traveling public from a public way except as provided in this chapter.

§ 1909. Eligibility for official business directional signs

Lawful businesses and points of interest and cultural, historic, recreational, educational and religious facilities are eligible for official business directional signs, subject to this chapter and to rules and regulations promulgated by the commissioner with the advice of the Travel Information Advisory Council, and to any federal law, rule or regulation affecting the allocation of federal highway funds or other funds to and or for the benefit of the State or any agency or subdivision thereof.

§ 1910. Types and arrangements of signs

Subject to this chapter, the commissioner, with the advice of the Travel Information Advisory Council, shall regulate the size, shape, color, lighting, manner of display and lettering of official business directional signs. Such regulations shall require uniformity among signs in accordance with the following minimum requirements: No sign shall exceed in size 20 inches by 84 inches; uniform colors shall be specified for each type of service and facility; lettering size shall be uniform; logos shall not exceed a uniform size; and posts shall be a uniform size, shape and color. An appropriate symbol may be specified for each type of eligible service or facility for inclusion upon official business directional signs.

§ 1911. Number and location of signs

1. Location limited. Official business directional signs shall only be located in those vicinities where the traveler must change direction from one public way to another to reach the business, facility or point of interest.

2. Number limited. Notwithstanding section 1918 of this chapter, the commissioner shall not issue more than 6 licenses for official business directional signs for any one place of business, facility or point of interest eligible therefor under section 1909, not more than one such official business sign shall be visible to traffic moving in any one public way leading toward the place of business, facility or point of interest nor shall any license be issued for a sign located more than 10 miles radius from the place of business, facility or point of interest, nor shall more than 2 licenses be issued to any one place of business, facility or point of interest for signs of the maximum size specified under section 1910.

3. Waiver of requirements. The commissioner may waive the specific requirements of this section if an applicant for a license can show unusual hardship due to conditions of topography, access or other physical characteristics.

§ 1912. Permitted locations

In adopting regulations relating to locations for official business directional signs, the commissioner shall take into con-

sideration such factors as the effect upon highway safety, the convenience of the traveling public and the preservation of scenic beauty.

When appropriate, because of the number of signs at one location, the signs shall be displayed in tiers or on panels. Subject to the traffic safety regulations adopted by the commissioner for the purposes of this chapter, the commissioner shall also specify by regulation the general types of locations where such posts, signs or panels may be erected and maintained, and the size, shape, lighting and other characteristics of the panels and posts, including the locations of signs thereon.

§ 1913. Categorical signs

1. Types of signs. The following signs may be erected and maintained without license or permit under this chapter as follows:

A. Signs of a duly constituted governmental body, a soil and water conservation district or regional planning district;

B. Signs located on or in the rolling stock of common carriers, except those which are determined by the commissioner to be circumventing the intent of this chapter. Circumvention shall include, but not be limited to, signs which are continuously in the same location or signs that extend beyond the height, width or length of the vehicle;

C. Signs on registered and inspected motor vehicles, except those which are determined by the commissioner to be circumventing the intent of this chapter. Circumvention shall include, but not be limited to, signs which are continuously in the same location or signs that extend beyond the height, width or length of the vehicle;

D. Signs, with an area of not more than 260 square inches, identifying stops or fare zone limits of motor buses;

E. Signs showing the place and time of service or meetings of churches and civic organizations in the

municipality or township. Each church or civic organization may erect no more than 4 signs. No sign shall exceed in size 24 inches by 30 inches;

F. Signs to be maintained for not more than 3 weeks announcing an auction, public supper, lawn sale, campaign, drive or other like event of a public, civic, philanthropic or religious organization, provided these signs are located within the municipality or township where the activity is located. The date of this event is to be conspicuously posted on each sign;

G. Memorial signs or tablets;

H. Signs erected by fairs and expositions within the county where the activity is located. These signs may be erected and maintained for 3 weeks before this event. The date of the event is to be conspicuously posted on each sign;

I. Signs erected for an election, primary or referendum. These signs shall be erected no sooner than 3 weeks before the date of the election, primary or referendum and shall be removed no later than one week after that date; and

J. Signs erected outside of the public right-of-way by non-profit historical and cultural institutions. Each institution, who has certified its nonprofit status with the commissioner, may erect no more than 2 signs with a surface area not to exceed 50 square feet per sign.

2. Regulation. The commissioner is authorized to promulgate regulations and orders, including prohibitions, for any sign or category of signs which are deemed to be contrary to highway safety or to the intent of this chapter.

The signs referred to in subsection 1 shall be subject to regulation, including prohibition, as set forth in section 1922.

3. Prohibited practices. None of the signs referred to in subsection 1 shall be erected or maintained on any traffic control signs or devices, public utility poles or fixtures or upon any

trees. None of these signs shall be painted or drawn upon rocks or other natural features.

4. Interstate system. None of the signs referred to in subsection 1, other than signs conforming with the provisions of subsection 1, paragraphs B and C, shall be located within the right-of-way limits of the interstate system or within 660 feet of the nearest edge of the interstate system and erected in such a fashion that the message may be read from the interstate highway.

§ 1914. On-premise signs

1. License and permit. No license or permit shall be required for an on-premise sign.

2. Number. On-premise signs on any one property shall not exceed 10 in number, except in the case of more than one business, facility, or point of interest being conducted on one property, signs for each business, facility or point of interest shall not exceed 10 in number.

3. Location. On-premise signs shall be located within 1,000 feet of the principal building where the business or facility is carried on or practiced or within 1,000 feet of the point of interest. Storage areas, warehouses and other auxiliary structures and fixtures shall not be deemed to be buildings where the business, facility or point of interest is carried on or practiced.

4. Location, relation to public way. No on-premise signs shall be permitted:

A. Within 33 feet of the centerline of any public way if the highway is less than 66 feet in width;

B. Within 20 feet from the outside edge of the paved portion of any public way with more than 2 travel lanes and a total paved portion in excess of 24 feet in width; or

C. Within the full width of the right-of-way of any public way.

Paragraphs A and B shall not apply to signs erected before September 1, 1957.

5. Interstate highways. Not more than one on-premise sign, advertising the sale or lease of the property, shall be permitted on land adjacent to any portion of the interstate system, including ramps and interchange areas, which is visible therefrom.

Not more than one on-premise sign visible from any portion of the interstate system including ramps and interchange areas, may be permitted more than 50 feet from the principal building or structure where the business, facility or point of interest is carried on.

No on-premise advertisement located more than 50 feet from the principal building or structure where the business, facility or point of interest advertised is carried on shall exceed 20 feet in length, width or height or 150 square feet in area, including border and trim, but excluding supports.

Any on-premise sign located more than 50 feet from the principal structure where the business, facility or point of interest is carried on that displays any trade name which refers to or identifies any service rendered or product sold shall display the name of the advertised business, facility or point of interest as conspicuously as such trade name.

6. On-premise signs prohibited. An on-premise sign shall be prohibited if it:

A. Attempts or appears to attempt to direct the movement of traffic or which interferes with, imitates or resembles any official traffic sign, signal or device;

B. Prevents the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic;

C. Contains, includes or is illuminated by a flashing, intermittent or moving light or lights;

D. Uses lighting in any way unless the light is in the opinion of the commissioner effectively shielded as to prevent beams or rays of light from being directed at any portion of the public way or is of such intensity or brilliance as to cause glare or impair the vision

of the operator of any motor vehicle or as to otherwise interfere with any driver's operation of a motor vehicle; or

E. Moves or has any animated or moving parts.

7. Signs erected on natural features. No on-premise sign shall be permitted which is erected or maintained upon trees or painted or drawn upon rocks or other natural features.

8. Height. The maximum height of on-premise signs shall be 25 feet above the ground level of land upon which it is located or if the sign is affixed to or is part of a building, the maximum is 10 feet above the roof of the building.

9. Jurisdiction by local authority in compact or built-up sections. Administration of this chapter by the Department of Transportation shall not apply to on-premise advertisements located in compact or built-up sections, the administration of which shall be the responsibility of local authority. In compact or built-up areas adjacent to the interstate, the Department of Transportation shall be responsible for the administration of this section. The "compact or built-up section" of any town or city shall be the territory contiguous to any highway which is built up with buildings devoted to business or dwelling purposes which are situated less than 200 feet apart from a distance of at least ¼ of a mile.

10. Approach signs. Any business or facility whose principal building, or a point of interest, which is located on a private way more than 1,000 feet from the nearest public way, or is not visible to traffic from the nearest public way, may erect no more than 2 approach signs with a total surface area not to exceed 100 square feet per sign. These signs are to be located outside the public right-of-way limits within 300 feet of the junction of the public and private ways.

§ 1915. Compensation

1. Payment of compensation. Compensation shall be paid for the removal of any sign lawfully erected as of the effective date of this chapter, and which is visible from the interstate or primary systems, except no compensation shall be paid if such sign is exempt as provided in section 1913 and no compensation

shall be paid for the removal of signs subject to immediate removal pursuant to section 1924, subsection 3.

2. Procedures. The purchase, condemnation, negotiation, assessment of damage and appeal procedures shall be in accordance with this section and sections 153 through 159.

3. Acceptance of federal funds. The commissioner may accept any allotment of funds by the United States, or any agency thereof, appropriated to carry out the United States Code, Title 23, section 131 and amendments thereto or replacements thereof. Any such funds will be applied to effectuate this chapter.

4. Availability of federal funds. No sign shall be required to be compensated if the federal share of the compensation to be paid under this section is not available.

5. Removal pursuant to other law. Nothing in this section shall provide compensation for the removal of signs which are lawfully removed pursuant to any other statute, regulation, ordinance or resolution of any governmental entity having jurisdiction.

6. Maintenance of lawfully erected signs. Any sign lawfully erected as of the effective date of this Act in accordance with section 1924, subsections 1 and 2, may be maintained until removed by the commissioner under subsection 7 or by section 1916.

7. Removal of signs for which compensation is paid. The commissioner shall remove a sign for which compensation is to be paid under this section when title to such sign is acquired by the State pursuant to section 154.

§ 1916. Removal of signs by amortization.

1. Exclusions. This section shall not apply to:

A. Signs for which compensation is paid under section 1915;

B. On-premise signs as provided in section 1914;

C. Exempt signs under section 1913;

D. Signs licensed under this chapter;

E. Signs to be removed under section 1917;

F. Signs subject to immediate removal pursuant to section 1924, subsection 3.

2. Six years amortization. Any sign lawfully erected as of the effective date of this Act may be maintained in accordance with section 1924 for 6 years after that date in order to amortize the value thereof. The owner of the sign shall remove the sign within 30 days of a receipt of a final order specified in subsection 3.

3. Procedure for notice, hearing, appeal.

A. The commissioner shall send to the sign owner notice by certified mail, return receipt requested, that a sign is to be removed pursuant to subsection 2.

Such notice shall be a final order if not appealed under paragraph B.

If the identity of such owner is not known or reasonably ascertainable by the commissioner, such notice may instead be sent to the owner of the land on which the sign is placed.

B. The person owning or controlling the sign may, within 30 days of his receipt of the notice to remove, appeal the order of removal to the commissioner and receive a hearing thereon, with a record made of the hearing. The commissioner shall render a decision within 60 days of the hearing. If no appeal is taken from the commissioner's decision, it shall be a final order. Any person aggrieved by the decision of the commissioner made subsequent to the hearing may, within 30 days of the receipt of notice of such decision, appeal to the Superior Court in the county where the sign is located. The appeal shall not be de novo and shall be subject to the Maine Rules of Civil Procedure, Rule 80b. For the purposes of this section, "person aggrieved" shall include the person owning or controlling the sign and any other person who is a resident of the county where the sign is located. A final judgment of a court shall be a final order for purposes of subsection 2.

§ 1917. Removal of unlawful signs

1. Notice to remove. The owner of a sign which was or is unlawfully erected or maintained either prior to or after the effective date of this chapter shall be in violation of this chapter until the sign is removed. The owner of the sign shall remove the sign within 30 days of receipt of a notice to remove, sent by certified mail, return receipt requested, by the commissioner. If the identity of such owner is not known or reasonably ascertainable by the commissioner, such notice may instead be sent to the owner of the land on which the sign is placed.

2. Commissioner to remove sign. If the owner fails to remove the sign as required, the commissioner shall remove the sign at the expense of the owner without any further notice or proceeding and may recover the expense of this removal from the owner.

3. Interpretation of chapter. Nothing in this chapter shall be interpreted to alter, abridge or in any way interfere with any duty or obligation of a sign owner to remove signs which were nonconforming and illegal prior to January 1, 1975, under the United States Code, Title 23, section 131, as enacted by Public Law 89-285, 89 Congress S. 2084, the "Agreement for carrying out National Policy relative to Control of Outdoor Advertising in Areas adjacent to the National System of Interstate and Defense Highways and the Federal-Aid Primary System" dated December 27, 1967, and as amended on January 3, 1968, executed by and between the United States of America and the State of Maine, under the Maine Revised Statutes, Title 32, sections 2711 to 2723.

The intent of this subsection is to preclude any presumption that this chapter is intended to extend the period of use of any sign which became nonconforming and illegal before January 1, 1975, under the state agreement of December 27, 1967, as amended January 3, 1968, and Title 32, sections 2711 to 2723.

4. Compensation subject to litigation. Whenever the compensation to be paid for removal of any sign is the subject of litigation, pending the litigation such sign shall be removed as provided in subsections 1 and 2.

5. Summary removal of illegal signs within the public right-of-way. Signs which are erected in nonconformance with this chapter and which are within the limits of any public right-of-way shall be subject to immediate removal by the commissioner.

§ 1918. Applications licensing of official business directional signs

1. Submitting applications. Any person who is eligible under section 1909 for an official business directional sign may submit to the commissioner a written application therefor, on a form prescribed by the commissioner. The application shall set forth the name and address of the applicant, the name, nature and location of the business, the location where an official business directional sign is desired and such other information as the department may require. The applicant shall tender with the application the standard license fee stated in section 1919 for each sign requested.

2. Granting licenses. Following receipt of an application for an official business directional sign, the commissioner shall approve or disapprove the application. The commissioner shall not approve an application unless the requested location conforms to the regulations of the commissioner adopted pursuant to this chapter. The granting of licenses for official business directional signs on the interstate systems by the commissioner is contingent upon any requirement precedent to such approval, such as the concurrence of federal officials.

If the application is approved, the commissioner shall issue the license. If it is not approved, the commissioner shall return the application and fee, stating the reasons for refusal and giving the applicant an opportunity to correct any defects or to be heard, within 30 days, by the commissioner. Upon written request by the applicant, the commissioner shall hear the matter and notify the applicant of his findings and decision. Any person aggrieved by the decision of the commissioner may, within 30 days of receipt of the notice thereof, appeal to the Superior Court in the county where the sign is proposed to be located. The appeal shall not be de novo and shall be pursuant to the Maine Rules of Civil Procedure, Rule 80b.

§ 1919. Fees

An applicant for an official business directional sign shall pay to the commissioner an initial license fee not to exceed $30 for each sign, and an annual renewal fee not to exceed $30. The amount of each fee shall be determined for each year by the commissioner in advance of such year and shall approximate to the extent practicable the amount computed by dividing the cost of the administration of the official business directional sign program by the number of signs in existence in the prior licensing year.

The fees so collected by the commissioner shall be deposited with the Treasurer of State and appropriated to carry out this chapter. Such funds shall not lapse but shall remain a continuing carrying account.

§ 1920. Penalty

Any person, firm, corporation or other legal entity who shall erect, maintain or display a sign contrary to and in violation of this chapter, or the rules and regulations promulgated by the commissioner, shall be punished by a fine of not more than $100 together with the cost of removal of the signs. The unlawful maintenance or display of each sign or advertising structure for any one day shall constitute a separate offense.

In addition to other penalties, the commissioner may, in the name of the state, institute any appropriate action, injunction or other proceeding to prevent, restrain, correct or abate any violation of this chapter, or any orders or the rules and regulations issued or promulgated hereunder.

§ 1921. Start of enforcement

To provide for the orderly implementation of this chapter, the State shall be divided by the commissioner into traveler information service areas which shall correspond to the Maine highway districts. The commissioner may implement the removal of signs for which compensation is paid on an area by area basis, provided all signs from which compensation is paid shall be removed within 4 years from the effective date of this chapter if federal funds are sufficient under section 1915.

§ 1922. Local ordinance

This chapter shall not supersede the provisions of any other statute, regulation, ordinance or resolution, the requirements of which are more strict than those of this chapter and not inconsistent therewith, whether such ordinance, bylaw, regulation, resolution or statute was enacted before or after the effective date of this chapter. It shall not be inconsistent with this chapter if such statute, regulation, ordinance or resolution prohibits official business directional signs.

§ 1923. Agreements with United States

The commissioner is authorized, empowered and directed to enter into agreements with the United States or its agencies and subdivisions to control signs in accordance with national standards, this chapter and the best interests of the State. Nothing in this chapter shall abridge any agreements with the United States in force on the effective date of this chapter.

§ 1924. License or permits under repealed Title 32, chapter 38

1. License. Any license issued pursuant to repealed Title 32, section 2713, shall remain in effect for 6 years from January 1, 1978, provided a licensee shall apply annually and pay the annual fee to the commissioner provided in repealed Title 32, section 2713. This subsection shall not allow the erection of any sign, pursuant to that license, after the effective date of this chapter, nor shall this subsection allow the maintenance of any sign removed pursuant to sections 1915 and 1916.

2. Fee permit. Any permit for which a fee is paid and which is issued pursuant to repealed Title 32, section 2714, shall remain in effect until the sign for which it is issued is removed pursuant to this chapter, provided a permittee shall apply annually and pay the annual fee to the commissioner provided in repealed Title 32, section 2714.

3. Existing directional signs. Upon implementation of this chapter, the commissioner may remove, or require to be removed, any existing directional sign erected and maintained pursuant to section 1153, Title 32, section 2722 prior to its repeal, and any sign erected and maintained pursuant to Title 32, section 2715 prior to its repeal, which does not qualify as an

on-premise sign as defined by section 1914 provided any such sign shall be removed no later than 6 years after January 1, 1978.

§ 1925. Administration

1. Administration of chapter. The commissioner shall administer this chapter with the advice of the Travel Information Advisory Council. The commissioner may employ, subject to Personnel Law, clerical and other assistants required for the administration of this chapter. The commissioner may delegate to personnel of the Department of Transportation the authority to administer this chapter. The commissioner may promulgate rules and regulations to administer the various provisions of this chapter that are consistent with the provisions thereof. The commissioner may execute contracts and other agreements to carry out the purposes of this chapter.

2. Effective date. To provide for an orderly transition and administration of this chapter, it shall become effective on January 1, 1978.

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NO. 80-1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE N. CAMPBELL, JR.
COMMISSIONER OF TRANSPORTATION
STATE OF MAINE

Appellant

v.

JOHN DONNELLY & SONS,
NATIONAL ADVERTISING COMPANY
AND WILLIAM S. SCHAEFFER

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION TO AFFIRM

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May 1, 1981

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Statutes:

Maine Traveler Information Services Act, 23 M.R.S.A. § 1901, *et seq.* 2

NO. 80-1597

IN THE

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COMMISSIONER OF TRANSPORTATION
STATE OF MAINE

Appellant

v.

JOHN DONNELLY & SONS,
NATIONAL ADVERTISING COMPANY
AND WILLIAM S. SCHAEFFER

Appellees

Motion to Affirm

Appellees[1] move that the judgment of the United States Court of Appeals for the First Circuit sought to be reviewed in this appeal be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

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[1]Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, appellees provide the following information:

National Advertising Company is a wholly owned subsidiary of its parent company, Minnesota Mining and Manufacturing Company. All other United States subsidiaries of Minnesota Mining and Manufacturing Company are wholly owned except Eastern Heights State Bank (St. Paul, Minnesota) which is 99% owned by the parent company.

John Donnelly & Sons has no parent company, subsidiaries or affiliates..

Argument

As alluded to in the appellant's Jurisdictional Statement (J.S. at 5), the issues considered by the lower courts in this case — *viz*: (1) whether the statewide abolition of an entire, unique, mode or medium of mass communication violates constitutional guarantees of freedom of speech and press, and (2) whether the statewide elimination and prohibition of the longstanding, legitimate business of outdoor advertising goes beyond the police powers of a state in violation of the due process clause — are essentially identical to those issues presented to this Court in the appeal from the ruling of the California Supreme Court in *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *prob. juris. noted*, 49 U.S.L.W. 3264 (Oct. 14, 1980) (No. 80-195). Oral argument in that case was heard by this Court on February 25, 1981.

The decision of the First Circuit below[2] concluded that the Maine Traveler Information Services Act, 23 M.R.S.A. § 1901, *et seq.*, which completely prohibits billboards in Maine, violates the First Amendment. The judgment declaring that law to be unconstitutional is, indeed, contrary to the decision of the California Supreme Court in *Metromedia*.

Although appellees disagree with some of the *dicta* contained in the two judge majority opinion authored by Judge Aldrich, and believe that the statement of the applicable constitutional principles is articulated with greater thoroughness and precision in the concurring opinion of Judge Pettine, the judgment entered by the First Circuit declaring the Maine Act unconstitutional is undoubtedly correct, and should be affirmed by this Court.

If the decision of the Supreme Court of California in *Metromedia* is reversed by this Court, the judgment below of the First Circuit Court of Appeals holding the Maine Act unconstitutional should be summarily affirmed.

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[2]The First Circuit opinion, reprinted in the Jurisdictional Statement as Appendix A, has now been reported. *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1980).

If, however, this Court should, for any reason, affirm the ruling of the California Supreme Court, it may be on the basis of facts which differ to some extent from those in this case.[3] If that should occur appellees would respectfully request the opportunity to file a Supplemental Brief in order to address those specific differences which might affect the consideration of the proper method of dealing with this appeal.

In support of their position that this cause needs no further argument, appellees incorporate by reference the legal authorities and arguments presently before this Court supporting the position of the appellants in *Metromedia, Inc. v. City of San Diego*, U.S. Sup. Ct. No. 80-195, including: "Brief of Appellants"; "Reply Brief of Appellants"; "Brief of the Outdoor Advertising Association of America as Amicus Curiae in Support of Appellants"; "Brief of the American Civil Libierties Union *Amicus Curiae*"; "Brief Amicus Curiae of the American Newspapers Publishers Association in Support of Appellants"; "Brief of Amicus Curiae Pacific Legal Foundation in Support of Appellants"; "Brief Amici Curiae on Behalf of Appellants Metromedia, Inc., and Pacific Outdoor Advertising Co., Inc., Urging Reversal"; and "Brief in Support of Jurisdictional Statement Filed by Amici Curiae Who Rely on Outdoor Advertising to Communicate."

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[3]The record in this case consists of extremely detailed factual presentations via a Master Affidavit and 27 individual affidavits from people such as Minority Leader of the United States House of Representatives, Congressman John J. Rhodes, Principal Deputy Assistant Secretary of the Army, Manpower and Reserve Affairs, Brigadier General Paul D. Phillips, U.S.A. Ret., well known national business leaders, and individual users and consumers of outdoor advertising information. These affidavits provide an extensive factual record relating to the nature and use of outdoor advertising as a unique, distinct and independent medium of mass communication. The affidavits and the record below contain detailed information relating to more than a dozen scientific studies of the impact of outdoor advertising devices on highway safety leading to the uncontradicted conclusion that there is *no* relationship between the occurrence of traffic accidents and the presence of roadside advertising signs or billboards. The record below, like that in *Metromedia*, is totally bereft of any facts which in any way could support any other conclusion.

Conclusion

Although there is a conflict between the decision of the Court of Appeals in this case and that of the California Supreme Court in *Metromedia, Inc. v. City of San Diego, supra,* which case is currently under advisement in this Court, it would be inappropriate for this Court to note probable jurisdiction of this case at this time. This Court should affirm the judgment of the United States Court of Appeals for the First Circuit. In the event that this Court affirms the decision of the California Supreme Court in *Metromedia,* appellees respectfully request the opportunity to submit a supplemental memorandum.

Respectfully submitted,

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